119-53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 151 — 4

FRANCIS DIANESE, APPELLANT,

vs.

JOHN E. KENDALL, JOHN D. McPHERSON, AND CHARLES V. GORDON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 4, 1882.

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JOHN E. KENDALL, JOHN D. McPHERSON, AND CHARLES V. GORDON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Original Bill. Filed April* 24, 1877.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL, JOHN D. MCPHERSON, and CHARLES V. GORDON. } No. 5520.

To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiff states as follows:

1. All the parties, plaintiff and defendant, are residents of the District of Columbia.

2. That on the first day of December, 1869, the plaintiff sold and conveyed to Charles V. Gordon lot No. 17, in square No. 140, in Washington city, in said district, for the sum of $6,500 in cash, and three notes, each for the sum of $2,000, payable in one, two, and three years from date, with interest, and secured by deed of trust on said real estate, in which deed the aforesaid John D. McPher-
2 son was constituted trustee.

Third. That in the month of August, 1870, the plaintiff sold the first of said notes to the defendant, Kendall, and received therefore the sum of $2,000, said note with interest then being worth upon its face the sum of $2,090; that on the 13th June, 1871, the plaintiff sold to said Kendall the second and third of said notes, said notes with interest being then worth upon their faces the sum of $4,368, and received in exchange for said sum only a check on the Bank of Washington for $1,803.79 and the first of said notes as aforesaid, on which said first note the said Kendall had previously, to wit, on the 28th December, 1870, received from said Gordon a payment of $128, endorsing the same on the back of said first note so exchanged.

4. That in the month of June, 1873, the said Kendall entered into an arrangement with the said Gordon without the knowledge or consent of the plaintiff, whereby said Kendall was placed in pos-
session of the real estate described in said deed of trust exe-
3 cuted to the said trustee, John D. McPherson, with power of attorney to collect the said rents arising from said real estate and of the four houses situate thereon; that the rents of said houses at the date of said power of attorney amounted to $57 per month; that said Kendall has been in the full possession and control of said houses from the first day of June, 1873, until the present time, and has collected all the rents arising from said real estate; that said rents since the said first day of June, 1873, ought to have realized the gross amount of $2,622 up to the first day of April, 1877.

5. That by the terms of the power of attorney executed by said Gordon to said Kendall, as plaintiff is informed and believes, the rents collected by said Kendall were to be applied, first, to the payment of certain expenses attending attempts to sell said real estate

theretofore made; second, to keeping said houses insured; and, third, to the payment of the debts secured by said deed of trust.

4 6. That plaintiff has been at all times since the said 13th day of June, 1871, and still is, the holder and owner of the said first note secured by said deed of trust; that no part of the rents collected by said Kendall have been applied to the payment of the note so held by the plaintiff, although by the terms of the said power of attorney one-third thereof should have been so applied.

7. That while said houses were in his possession said Kendall permitted them to become dilapidated and out of repair and a deposit for excremend and fifth; and that while said real estate was in a condition unfit for sale, and at a time when real estate could only be sold at great sacrifice, the said Kendall, in the month of December, 1876, caused the said trustee, McPherson, to advertise said real estate for sale under said deed of trust; that thereupon the said Charles V. Gordon filed his bill in this court, the same being equity cause

5 No. 5339, against said Kendall, Trustee John D. McPherson, and this plaintiff, setting up the fact above alleged in this paragraph, and the additional fact that by an agreement made between said Kendall and said Gordon, when the said power of attorney was delivered, it was expressly stipulated between them that said real estate should not be sold, but that the debt secured by said deed of trust should be paid out of the rents of said houses; that in his answer to said bill filed in said cause the defendant, Kendall, slandered the title of the said trustee, John D. McPherson, and referring in said answer to the title of Charles V. Gordon, from whom said trustee, McPherson, derived his title as trustee, denied that there was any *bona fide* sale of the said real estate by this plaintiff to said Gordon, and falsely averred that the said sale was colorable only and designed by said Dainese as a method of defrauding his creditors, which slander of the said trustee's title was spread upon the

6 records of this court, as by reference to the said Kendall'- answer in said cause will fully appear, and that upon a hearing on said bill and answer the said Gordon's application for an injunction was denied.

8. That thereunpon said trustee, McPherson, upon the order of said Kendall readvertised said real estate, and the same was offered for sale on the 26th day of March, 1877, upon the following terms, to wit, one-fourth of the purchase-money in cash and the balance in equal instalments, payable in 6, 12, and 18 months; that the said day was inclement, and rain was falling while the said property was being sold; that said Gordon was present and read a protest against said sale, and a notice that the same would be contested; that there was but one bid offered on all of said real estate, and said bid was offered by the defendant, Kendall, and all of said real estate was struck off to him at the sum of $2,000.

9. That said real estate so bid in at said sale was worth the

7 sum of $6,000; that said Kendall had made it impossible for said real estate to realize anything near its full value at public sale by reason of his said slander of the trustee's title as aforesaid, by reason of the dilapidated condition in which he had suffered the

said house to be offered for sale, by reason of the unsuitable day selected for said sale, and by reason of the violation of the contract with said Gordon not to sell, which induced the said protest.

10. The plaintiff says that said real estate can properly be sold under the order of the court to the advantage of all the parties concerned, and for a sum sufficient to pay off all the liens upon the same, if the same be sold in parcels comprising one of the said houses each at a small cash payment on each, and long deferred payments in quarterly or yearly instalments.

11. That a sale can be effected of said real estate for the
8 sum of $6,000 when the houses upon said real estate shall have been repaired so as to be in as good condition as when the same were placed in the care of said Kendall, for which repairs an expenditure of $250 will be sufficient, as the plaintiff believes, of which sum of $6,000 400 will be paid in cash and the balance in ten (10) yearly instalments of $560 each, with interest, and secured by deed of trust on the premises, as by the terms of an offer hereto attached, marked Exhibit F. D., No. 1, and the affidavit of Clarence L. Compton thereto attached, will more fully appear.

12. That if said sale be consummated and said Kendall be fully vested with the title to said real estate, he will have received upon his two notes, each for the sum of $2,000, with interest, real estate of the value of not less than $6,000, and cash payments of all the rents of said real estate for nearly 4 years, and the plaintiff
9 will be wholly without payment or security for the $2,000 note still held and owned by him.

13. That in October, 1874, said Kendall became the purchaser of a certificate on said real estate at a sale for taxes, and, as plaintiff believes, has since received a tax deed for the same with a view to secure the absolute title to said real estate in himself and for the purpose of complicating said title by a cloud upon the same in order to prevent a *bona fide* sale of said real estate.

Therefore the plaintiff prays—

1. That subpœnas issue directed to the defendants, John E. Kendall, John D. McPherson, and Charles V. Gordon, requiring them to appear and answer the exigencies of this bill.

2. That the said pretended sale of said real estate be set aside and vacated.

10 3. That said real estate be placed in the hands of a receiver, with directions to rent the same and apply the rents to the necessary repair and protection of said property, and to the extinguishment of all tax liens thereon.

4. That after said houses shall have been placed in a condition fit for sale, *that* the said real estate be sold under the order of the court in parcels to suit purchasers, who would buy houses of their character for residences on long time, with small cash payments and quarterly or yearly instalments of the unpaid balances secured by deed of trust on the premises, and that the proceeds of said sale be apportioned between the plaintiff and said Kendall in proportion to the amounts of the notes so held by them respectively.

5. That said Kendall be required to pay to the plaintiff
11 one-third of the net proceeds of the rents already collected by him from said houses, to be applied upon the note held and owned by the plaintiff.

6. That this cause be referred to a special auditor to ascertain and report the amounts due the parties hereto upon the notes held by them, respectively, and the amounts already received by each of said parties, respectively, and the proportionate amounts to be paid to the said parties out of the proceeds of the sale of said real estate.

And for such other and further relief as the nature of the case may require.

ROSS AND DEAN,
Sol. for Pl'ff.

DISTRICT OF COLUMBIA, *ss:*

I, Francis Dainese, do solemnly swear that I have read the bill by me subscribed, and know the contents thereof, and that the facts therein stated as of my own knowledge are true, and that
12 the facts therein stated upon the information of others I believe to be true.

F. DAINESE.

Subscribed and sworn to before me, this 24th day of April, 1877.
JOHN ROSS,
Notary Public.

Compton's Offer to Purchase.

I hereby offer to purchase Mr. Gordon's four houses, lying on lot 17, in square 140, on 19th street, between L and M northwest, for the sume of $6,000, payable $400 in cash, balance in ten notes, secured by deed of trust on the property, payable yearly, with interest, after certain repairs have been made.

Washington, D. C., Apr. —, 1877.

CLARENCE COMPTON.

DISTRICT OF COLUMBIA, *to wit:*

Clarence L. Compton, having been duly sworn, upon his oath says: That he is the son of Maria Compton, by whom the above offer is subscribed; that affiant knows that said Maria Compton is willing and prepared to purchase lot No. 17, in square
13 No. 140, in Washington, D. C., at the price of $6,000; and that she, the said Maria Compton, is prepared to pay thereon the sum of $400 in cash, and to give ten notes for the unpaid ballance, each for the sum of $560, and payable in from one to ten years, inclusion, with interest, and secured by deed of trust on said real estate.

CLARENCE L. COMPTON.

Subscribed and sworn to before me, this 20th day of April, 1877.
JOHN W. ROSS,
Notary Public.

[Endorsed:] [In pencil:] (1.) In equity. No. 5520. Francis Dainese *vs.* John E. Kendall *et al.* Original bill. The clerk will please file. Ross & Dean, sol. for pl't'f. Ross & Dean, sol. for pl't'f.

14 [In pencil:] 2, 3, 4.

Subpœna to Answer. Issued April 24, 1877.

In the Supreme Court of the District of Columbia, the 24th day of April, 1877.

FRANCIS DAINESE, Complainant, *against* JOHN E. KENDALL *et al.*, Defendant. } No. 5520. Eq'y Doc. 17.

The President of the United States to John E. Kendall, John D. McPherson, Charles V. Gordon, defendants:

[L. S.]

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of the subpœna, and answer the exigency of the bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Carter, chief justice.

R. J. MEIGS, *Clerk*,
By M. A. CHANCY,
Ass't Clerk.

Memorandum.

That the defendants herewith served are to enter their
15 appearance in this suit, in the clerk's office, on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

[In pencil:] (3.)

Marshal's Return. Filed April 25th, 1877.

Served John E. Kendall, April 24th, 1877.

F. DOUGLASS, *Marshal.*

Ross & Dean: Set April 22.

STAHL.

[In pencil:] (4.)

Service acknowledged May 7, 1877.

JOHN D. McPHERSON.

[Endorsed:] [In pencil:] (2, 3, 4.) No. 5520. Eq'y dock. 17. Francis Daines *vs.* John E. Kendall *et al.* Issued April 24, 1877. Returned April 25, 1877. 609 E. In. $1. Marshal's return. Served John E. Kendall, April 24th, 1877. F. Douglass, marshal. Ross & Dean: Set April 22. Stahl.

[In pencil :] 4½.

16 *Separate Answer of John D. McPherson. Filed May 11th*, 1877.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINES, Complainant,
v.
JOHN E. KENDALL & others. } No. 5520.

The separate answer of John D. McPherson to the bill of complaint of Francis Dainese.

This defendant says :

1. He admits the residence of plaintiff and this defendant as stated in the first part.

2. He knows nothing of the sale of the property by Dainese to Gordon, or of the terms thereof, except the single fact that the defendant was made trustee in the deed of trust to *sum* the notes given *p'r* deferred payments.

3. He knows nothing of the sale of the notes to John E.
17 Kendall, but only that W. Kendall holds two of the notes.

4. He knows nothing of the particulars of the arrangement under which W. Kendall receives the rents of the property, but only that some such arrangement was made.

5. He knows not what amount the rents did produce or ought to have produced.

6. He knows not whether the complainant has received any part of said rents.

7. It is true that the houses have become dilapidated, and are in urgent need of attention and repairs.

8. It is true that this defendant offered the property for sale at the request of Mr. Kendall, who held two of the notes secured thereon, and that at the sale it was struck off to Mr. Kendall for the sum of $2,000, being $500 for each house; that W. Kendall was the only bidder. It is not strictly correct to say that rain was falling at
18 the time of the sale. The day had been show-ry and rain fell some short time before the sale, and perhaps later in the day. But at and about the time of sale the rain had ceased. At the sale there was a small crowd in the street in front of the premises, attracted partly by this sale and partly by another sale on the opposite side of the street then about to take place. This defendant does not think the rain then was sufficiently threat-ing to deter any one who desired to purchase from attending the sale. Mr. Gordon read aloud a protest against the sale.

9. This defendant does not know what at this time was the value of the property, but having some knowledge of the value of the grounds in that immediate vicinity, and having inspected the buildings in question, he determined to accept any bid of two thousand dollars or upwards.

10, 11, 12, 13. This defendant has no knowledge of any of
19 the matters mentioned in the 10, 11, 12, & 13 paragraphs of the bill.

This defendant adds that he has not yet executed a deed conveying the property *of* the purchaser.

And having answered this defendant prays, &c.

JOHN D. McPHERSON.

[Endorsed:] [In pencil:] (4½.) No. 5520. Francis Dainese *v.* John E. Kendall & others. Separate answer of John D. McPherson. The clerk will please file. Jno. D. McPherson.

[In pencil:] 5.

20 *Answer of Defendant Kendall to Part of Bill. Filed June 23, 1877.*

In the Supreme Court of the District of Columbia, the 22nd day of June, A. D. 1877.

FRANCIS DAINES *vs.* JOHN E. KENDALL *et al.* } No. 5520. Eq. Doc.

The separate answer of the defendant, John E. Kendall, to part of the bill of complaint of the above-named plaintiff.

This defendant, reserving all right of exception to the errors in the said bill contained, for answer unto so much thereof as is not covered by his plea in this cause filed, says:

1st. I admit the residence of the parties hereto as averred.

7th. I deny that I have permitted the said houses to become a place of deposit for excrement. I admit that I made no repairs upon them while collecting the rents therefrom under the said power of attorney, as I was not authorized so to do by that instrument.

21 I admit that I directed the advertisement set out in this paragraph of the bill, and I aver that I only did so after a default of some three years in the payment of the debts secured by the said deed of trust, and after exhausting all other means of realizing the amount of my indebtedness had failed. I admit the proceedings of record in said cause numbered 5339 equity docket.

8th. I admit the readvertisement and sale as set forth in paragraph 8 of the said bill. I admit that it had been raining upon the day of sale, but deny that rain fell at or near the time thereof. I admit that the said Gordon read a protest against the said sale at the time the property was offered, and I believe that the same was prepared by and read at the instigation of the said Dainese. I admit that in consequence of the reading of the said protest I was the only bidder for the said property, and that I purchased the same for the sum of $2,000.00.

22 9th. I deny that the said real estate was worth the sum of $6,000.00. I own that since my said purchase and before the filing of this bill I had contracted to expend, and that I have since expended, over the sum of $2,000.00 for necessary repairs upon the said premis s in order to render the same tenable. I have herein-

before fully answered the remaining averments of the said paragraph.

10th. I deny the conclusions of law set forth in paragraph numbered 10 of the said bill.

11th. I deny that $250.00 would have been sufficient to repair the said premises. On the contrary I own that I have expended over the sum of $2,000.00 in necessary repairs thereof. I deny the correctness of the opinion contained in the remaining parts of this paragraph.

12th. The averments contained in paragraph numbered 12 of the said bill are fully covered by the plea and answer herein filed.

13th. I admit that in consequence of the entire neglect of the said Gordon to pay taxes upon the said property since the year 1869 I have been forced to buy in in the same as tax sale in order
23 to protect my deed of trust thereon. I deny the purpose imputed to me by this paragraph in making this purchase.

And now, having fully answered so much of the said bill as is not covered by my said plea, I pray to be hence dismissed, with costs.

JNO. E. KENDALL.
R. ROSS PERRY, *Solicitor.*

I do solemnly swear that I have read the above answer by me subscribed, and that I know the contents thereof; that the matters therein stated of my own knowledge are true, and that the matters therein stated on information and belief I believe to be true.

JNO. E. KENDALL.

Sworn before me June 23, 1877.

R. J. MEIGS, *Clerk.*

[Endorsed:] [In pencil:] (5.) No. 5520. Dainese *vs.* Kendall. Eq. Doc. Answer of defendant Kendall to part of bill. R. Ross Perry, sol'r.

[In pencil:] (6.)

24 *Plea of Defendant Kendall to Part of Bill. Filed June* 23, 1877.

In the Supreme Court of the District of Columbia, the 22nd day of June, A. D. 1877.

FRANCIS DAINESE *vs.* JOHN E. KENDALL. } No. 5520. Eq. Doc.

The plea of John E. Kendall, defendant, to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill of complaint mentioned and contained to be true in such sort, manner, and form as the same are therein set forth and alleged, for plea to so much and such part of the said bill as is contained in the paragraphs thereof numbered from two to six, inclusive, says: That

before the plaintiff exhibited his said bill of complaint against this defendant this defendant duly brought an action, No. 13391, on the law side of this court against the plaintiff upon one of the
25 notes set out in the 2nd paragraph of the said bill, and that the same matters set forth in the said paragraphs of the said bill were by the said Dainese filed in defense of the said action at law, and that upon issue joined therein the said issue was found in favor of the said Kendall, and judgment was so entered thereon, which said judgment was obtained before the plaintiff's said bill was filed, and was for the same matters set forth in the said part of said bill, and which said judgment still remains in full force and is not undone by error. Therefore this defendant doth plead the said former judgment in bar to so much of the said bill as is hereinbefore particularly mentioned, and prays the judgment of this court whether he should be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to, and prays to be hence dismissed, with his reasonable costs and charges in that behalf
26 most wrongfully sustained.

JNO. E. KENDALL.

R. ROSS PERRY, *Solicitor.*

I do solemnly swear that the matters of fact stated in the foregoing plea are true, and that the plea is not interposed for delay.

JNO. E. KENDALL.

Sworn before me, June 23, 1877.

R. J. MEIGS, *Clerk.*

I certify that, in my opinion, the foregoing plea is well founded in point of law.

R. ROSS PERRY, *Solicitor.*

[Endorsed:] [In pencil:] (6.) No. 5520. Dainese *vs.* Kendall *et al.* Eq. doc. Plea of defendant Kendall to part of bill. Please file. R. Ross Perry, solicitor.

[In pencil:] (7.)

27 *Order Allowing Plea to Stand for Answer. Filed Feb'y* 26, 1878.

In the Supreme Court of the District of Columbia, at a special term thereof, held this 26th day of February, A. D. 1878, McArthur, justice.

FRANCIS DAINES *vs.* JOHN E. KENDALL *et al.* } No. 5520. Eq. Doc.

This cause came on to be heard at this term upon the pleas filed to part of said bill by the defendant, Kendall, and the sufficiency of the said pleas was argued by counsel and considered by the court, whereupon it is ordered that the said plea be overruled as a plea, but that it stand as an answer of said defendant to so much of the said bill as it purports to cover, and the said defendant have *learned*

within twenty days to file such further answer as he may be advised.

By the court:

McARTHUR, *Justice.*

[Endorsed:] No. 5520. [In pencil:] (7.) Dainese *v.* Kendall. Eq. doc. Order allowing plea to stand for answer.

[In pencil:] (8.)

28 *Motion to Dismiss Bill. Filed Jan'y* 22, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL & *al.* } No. 5520.

The defendant, John E. Kendall, by his solicitor, moves the court that the bill of complaint in this case be dismissed.

R. ROSS PERRY, *Solic'r.*

Take notice that at 10 o'clock a. m. on Saturday, Jan'y 22nd, or so soon thereafter as counsel may be heard, I shall call up the above motion for hearing.

To Messrs. Cuppy & Ingersoll.
" Ross & Dean.

Received a copy of the above motion and notice, this 20th day of January, 1881.

CUPPY & INGERSOLL,
Sol'rs for Dainese.

[Endorsed:] In equity. No. 5520. [In pencil:] (8.) Dainese *vs.* Kendall & *al.* Motion to dismiss bill. Clerk will please file. R. Ross Perry, Kendall's solic'r.

[In pencil:] (9.)

29 *Order Dismissing Original Bill of Complaint. Filed Jan'y* 22, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL. } No. 5520.

This cause coming on to be heard on motion of defendant, Kendall's solicitor, to dismiss the original bill of complaint, and it appearing to the satisfaction of the court that plaintiff's solicitors, Messrs. Cuppy & Ingersoll, were served with due notice of said motion, and it further appearing that, an replication, has been filed in said cause, as provided by the rules of this court, it is, this 22nd day of January, 1881, by the court, ordered, adjudged, and decreed that the said motion be granted, and that the said bill of complaint be, and the same

is, hereby dismissed: Provided, that the complainants may, within ten (10) days, come into court, and on proper cause shown have leave to move to have this order set aside.

By the court:

W. S. COX, *J.*

[Endorsed:] In Equity. No. 5520. [In pencil:] (9.) Dainese *v.* Kendall *& al.* Order dismissing original bill of complaint. M. 16, p. 535. 2. R. Ross Perry, def't's sol'rs.

30 *Motion to Set Aside Decree Dismissing Bill. Filed Jan'y* 29, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520.

And now comes the plaintiff, by his solicitor, and move- the court to set aside the decree entered on the 22nd day of January, 1881, dismissing the plaintiff's bill.

ROSS & DEAN,
Sol. for Pl'ff.

To R. Ross Perry, Esq., sol. for Def't Kendall:

Please take notice that the above motion will be called for hearing on Tuesday, the first day of February, 1881, or as soon thereafter as counsel can be heard.

ROSS & DEEN,
Sol. for Pl'ff.

Received a copy of the above.

R. ROSS PERRY.

[Endorsed:] In equity. No. 5520. Dainese *v.* Kendall *et al.* Motion to set aside [order] dismissing bill.

31 *Order Setting Aside Decree Dismissing Bill. Filed Feb'y* 1, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL. } No. 5520.

This cause came on to be heard upon the motion of the plaintiff to set aside the decree heretofore passed on the 22nd day of January, 1881, dismissing the plaintiff's bill; and, the same having been considered by the court, it is, this first day of February, 1881, ordered by the court that said decree be set aside and vacated, and that the plaintiff have *been* to file his replication to the answer of the defendant, provided that the plaintiff have his testimoney filed on the clerk's office within three weeks from the date of this decree.

W. S. COX, *J.*

[Endorsed:] In equity. No. 5520. Dainese *vs.* Kendall *et al.* To the setting aside decree dismissing bill.

32 *Replication. Filed Feb'y* 1, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520.

The plaintiff hereby joins issue with the defendants.

ROSS & DEAN,
Sol. for Pl'ff.

[Endorsed:] In Equity. No. 5520. Dainese *vs.* Kendall *et al.* Replication. The clerk will file. Ross & Dean, for pl'ff.

33 Leave is granted to file this cross-bill.

U. S. COX, *J.*

Cross-bill of Defendant, John D. McPherson. Filed Feb'y 11, 1881:

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL, JOHN D. MCPHERSON, and CHARLES V. GORDON. } No. 5520. Doc. 17.

The defendant, John D. McPherson, having answered the original bill, now, by leave of the court, files this cross-bill against the complainant, Francis Dainese, and the defendants, John E. Kendall and Charles V. Gordon, and says:

1. That by a certain deed of trust, dated December 1st, 1869, and recorder in liber 602, fol. 324, of the land records for the District of Columbia, the defendant, Charles V. Gordon, conveyed to this defendant lot No. 17, in square No. 140, in the city of Washington, in the District of Columbia, upon trust, to secure the payments of these promissory notes, described in the said deed of trust drawn
34 by the defendant, Charles V. Gordon, and payable to the order of the said Francis Dainese in one, two, and three years, respectively, from the date thereof, December 1, 1869, with interest. The said deed of trust is prayed to be taken as a part hereof.

2. That on or about the 26th day of March, in the year 1877, default having been made in the payment of the said notes, this defendant, at the request of John E. Kendall, one of the defendants to the original bill, who was a holder of two of the notes secured by the said deed of trust, and in conformity with the terms of the same, offered the said lot of land for sale at public auction, and at the said sale the said Kendall, being the highest bidder, the same was knocked down to him for the price of two thousand dollars, but the validity of the said sale was disputed by the said Francis Dainese and the

said Charles V. Gordon, and this defendant did not convey
35 the said property to the said John E. Kendall, nor did the said John E. Kendall pay to this defendant any part of the purchase-money, except the sum of one hundred dollars, commissions, and thereupon the said Francis Dainese filed the original bill in this cause to vacate the sale made as aforesaid, which said bill is now pending, and in the said original bill the said Dainese assigned various reasons why the said sale should be vacated, among which inadequacy of price and the unfavorable weather prevailing at the time of sale, all of which will appear by the said original bill.

3. That this defendant submits to the judgment of the court all the said reasons for vacating the said sale assigned in the original bill, and in so far as the said original bill alleges any reasons for vacating said sale which reflect on the conduct of this defendant in making the said sale by virtue of the trust contained in the
36 said deed of trust, the defendant makes his answer to the original bill filed in this cause a part of this cross-bill, and asks leave to read the same as a part hereof on the hearing, and inasmuch as it will appear by the proceedings in this cause that there are serious questions of difference between the said John E. Kendall and the said Francis Dainese, stated in the original bill, in regards to the amounts due upon the notes held by them, respectively, and secured by the said deed of trust, and their respective claims upon the proceeds of sale, which controversies would not be determined by a decree upon the original bill, but which this defendant would have to determine or resort to another suit to settle the same, and inasmuch as this complainant is advised that he is entitled to have the direction of a court of equity in the execution of the trust
37 reposed in him by said deed of trust, both as regards the making of the conveyance and the disposition of the proceeds of sale, he files this cross-bill for that purpose, and prays:

Prayers.

1st. That the writ of subpœna of the United States may issue, to be directed to the said John E. Kendall, Charles V. Gordon, and Francis Dainese, commanding them to appear and answer make to the matters and things contained in this cross-bill, &c.

2nd. That a decree shall be made directing the payment to this defendant of the purchase-money by the said Kendall (with interest from the day of sale), and the conveyance of the said property.

3rd. That all necessary accounts shall be taken between the said Dainese and the said Kendall in respect to the notes by them held showing the proper distribution of the proceeds of sale, and
38 that this defendant shall be allowed his commissions and counsel fees out of the fund for the expense incurred by him in this proceedings.

4th. That this defendant may have such other and further relief as the nature of the case may require.

The defendants to this cross-bill are John E. Kendall, Charles V. Gordon, and Francis Dainese.

JNO. D. McPHERSON.

[Endorsed:] [In pencil:] (13, 14.) 5520. Eq. Doc. 17. Francis Dainese *v.* John E. Kendall *et al.* Cross-bill of defendant, John D. McPherson. Leave is granted to file this cross-bill. W. S. Cox, J.

39 *Separate Answer of Defendant John E. Kendall to the Cross-Bill of the Defendant John D. McPherson. Filed Feb'y* 17, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL & *al.* } No. 5520.

The separate answer of the defendant, John E. Kendall, to the cross-bill of the defendant, John D. McPherson.

In answer to the said cross-bill I say as follows:

1. The deed of trust referred to in this paragraph of the cross-bill is matter of record.

2. I admit the matters and things set out in this paragraph of the cross-bill to be as stated, save in one particular, viz., the payment of one hundred dollars therein referred to was made by me, not on account of commissions of the said trustee, John D. McPherson, but on account of the purchase-money of the property in question and in accordance with the conditions of the sale, which provided
40 that a deposit of one hundred dollars would be required of the purchaser on the day and at the time of the sale.

3. I admit that the said McPherson is entitled to the assistance and direction of the court in the execution of the trust reposed in him by the deed set out in the first paragraph of his cross-bill; but I deny that the plaintiff in this case has any interest in the fund in question sufficient to create any serious controversy between him and myself, or in any way to prejudice the said McPherson, should he proceed to the regular and immediate execution of the said trust, the claim put forward by Dainese of title to one of the notes secured by the said deed of trust in *res adjudicata* the same question, as well as that of ——, accounting for rents, having been decided by the general term of this court in the case of "Kendall *vs.* Dainese," at law, No. 13391, to which case, as well as that of "Gordon *vs.* McPherson," in equity, No. 5339, reference is hereby made, and both
41 of which cases, it is prayed, may be taken as part hereof.

JOHN E. KENDALL.

WALTER A. PERRY,
Solic'r for Def't Kendall.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

I do solemnly swear that I have read the above answer by me subscribed, and know the contents thereof; that the matters therein stated of my own knowledge are true, and that the matters therein stated on information and belief I believe to be true.

JNO. E. KENDALL.

Subscribed and sworn to before me, this 17 day of February, 1881.
R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, No. 3,
Ass't Clerk.

[Endorsed:] [In pencil:] (15.) In equity. No. 5520. Dainese *vs.* Kendall & *al.* Separate answer of defendant John E. Kendall to the cross-bill of the defendant John D. McPherson. Clerk will please file. Perry & Wilson, Kendall's sol's.

42 *Stipulation of Counsel. Filed Feb'y* 19, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL & *al.* } No. 5520.

It is, this 15th day of February, A. D. 1880, stipulated and agreed between the solicitors in this case:

1. That the order of date, the 1st day of February, 1881, allowing the plaintiff three weeks within which to file his testimony, be extended so that the plaintiff have until the 8th day of March, 1880.

2. That the defendant Kendall shall file his testimony by the 20th day of March, 1880.

3. That the said solicitors shall accept service, Mr. Perry for the defendant Kendall and Mr. Brown for the plaintiff and for the defendant Gordon, and shall file answers for the same by the 23rd day of February, 1880.

CHAPIN BROWN,
Sol'c'r for Dainese & Gordon.
WALTER A. PERRY,
Sol'c'r for Def'ts Kendall.

[Endorsed:] [In pencil:] (16.) In equity. No. 5520. Dainese *v.* Kendall & *al.* Stipulation of counsel. Clerk will please file. Perry & Wilson.

43 *Answer of C. V. Gordon and F. Dainese to Cross-bill. Filed Feb'y* 23, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL, JOHN D. MCPHERSON, and CHARLES V. GORDON. } No. 5520. Doc. 17.

The answer of Charles V. Gordon and Francis Dainese to the cross-bill of John D. McPherson, defendant to the original bill.

In answer to the said cross-bill we say as follows:

1st. We admit the allegations contained in the first and second sections of the said cross-bill except so much of the second section of

the said cross-bill as alleges that the said John E. Kendall did not pay to said McPherson any part of the purchase-mone-, &c., as to which allegation we have no personal knowledge and can
44 neither admit nor deny the same, but believe the same to be true, and in so far as the said defendant McPherson makes his answer to the original bill filed in this cause a part of his cross-bill we ask leave to read the original bill as a part of this answer on the hearing.

2nd. And further answering said defendants said cross-bill we say that we interpose no objection to the manner proposed in the third section of the said cross-bill for the settlement of the matters in dispute set forth in said third section.

CHAS. V. GORDON.
F. DAINESE.

CUPPY & INGERSOLL,
CHAPIN BROWN,
Sol'rs for Gordon & Daines-.

[Endorsed:] 5520 equity. Doc. 17. Francis Dainese *v.* John E. Kendall. Answer of Charles V. Gordon and Francis Dainese to the cross-bill of John D. McPherson. The clerk will please file.

45 *Testimony of Complainant. Filed April* 6, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5560. Doc. No. —.

Complainant's Depositions.

Witnesses.	Direct.	Cross.	Redirect.	Recross.	Pl'ff's Exc'p'ns.	Def'ts' Exc'p'ns.
Charles C. Duncanson	48	52	59	61	—	—
Edward S. Wescott	62	68	×	×	—	—
Charles V. Gordon	70	73	×	×	—	—
Francis Dainese	76	78	82	82	—	—
— x — x — x — x —						
In rebuttal:						
—. x .—						
George H. Trandell	119	124	×	×	—	—
Charles V. Gordon	127	132	×	×	—	—

46 *Caption.*

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520. Doc. —.

DISTRICT OF COLUMBIA, *ss:*

Be it known, that at an examination of witnesses begun and held

on the seventh day of March, A. D. 1881, and the depositions hereto attached were taken, I, Henry H. Alexander, an examiner in chancery, did cause to be personally present at my office No. 470 Louisiana Avenue, northwest, in the city of Washington, in said district, Chas. C. Duncanson, Edward S. Wescott, Charles V. Gordon, and Francis Dainese, and George H. F. Frandell, and Chas. V. Gordon, in rebuttal, to testify on the part and behalf of the complainant in a certain cause now pending in the supreme court of the District of Columbia, wherein Francis Dainese is complainant and John E. Kendall *et al.* defendants.

47 *Certificate.*

DISTRICT OF COLUMBIA, *ss:*

I, Henry H. Alexander, examiner in chancery, do hereby certify that in pursuance of the agreement between counsel, the depositions hereto attached were taken down by me and reduced to writing in the presence of, and from the oral statement of the witness at the time and place designated in the caption above, and after — had been reduced to writing were read over by the witnesses and by them subscribed in my presence. The witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

HENRY H. ALEXANDER,
Examiner in Chancery.

48 In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.*
No. 5520.
Doc. No. —.

MARCH 7TH, 1881.

Met pursuant to agreement at the office of H. H. Alexander, examiner in chancery, No. 470 Louisiana Avenue, at 2 o'clock p. m.

Present: Messrs. Cuppy & Brown, counsel for complainant, and Mr. W. S. Perry, counsel for defendants, thereupon—

CHARLES C. DUNCANSON, a witness of the lawful age, was produced on the part and behalf of the complainant and sworn and examined, as follows:

By Mr. CUPPY:

Q. You can state where you reside, and what your occupation is and has been, and for how long.

A. I reside in Washington, D. C., and am an auctioneer by
49 occupation. I have been in the auction business since 1862; since 1873 for myself.

Q. In what kind of auction business?

A. General; real and personal.

Q. Do you know anything about the sale of lot 17, in square 140?

A. Personally, I know nothing in regard to the sale.

Q. Are you familiar with real estate values in this city?

A. Yes, sir.

Q. Were you familiar with that and adjacent property on March 26th, 1877?

A. Well, I don't know whether it is lot 17 or not. Sometime about two or three years ago I was asked by Mr. Dainese to go up and look at certain properties and give him my idea of how they would sell and what they would bring. The exact date when I went I couldn't state, except that it has been about three years or more ago; but I did so; I looked at houses on the east side of 19th street, between L and M, northwest. I knew nothing in regard to any contro-
50 versy at all at the time, and I certified to what I considered the value of them. Where that certificate is, or what has become of it, I don't know.

Q. (Submitting a paper to witness.) Look at that, Mr. Duncanson.

A. That, I believe, is the certificate, or about the purport of it.

Q. Is not that the actual certificate that you then made; is not that your signature?

A. That is my signature; it is not the actual certificate, I don't think?

Q Well, what did you regard as the fair market value of those lots?

A. At *what* time I certified that, if sold upon a small cash payment, and the balance monthly, in small payments, that they would bring about a thousand dollars.

Q. A thousand dollars apiece?

A. Yes, sir.

Q. You speak of lots and houses now?

A. I made an examination, I believe, of three or four of
51 them in 1877; two of which are, I think, *are* in that certificate. There I testified that I got other information in regard to the rental of them. They were mostly all alike. There was very little difference between them.

Q. You do not remember the exact date, do you?

The WITNESS: That I made that certificate?

Mr. CUPPY: Yes.

A. I really do not, sir; I am called upon to give values in regard to real estate quite often; I make no note of dates.

Q. Do you know whether it was before or after the sale that you were called upon to look at the property?

A. I do not, sir; I can only infer.

Q. Will you describe particularly where the houses were situated?

A. They were on the east side of 19th street, between L and M streets, nearer the corner of M than they were to L. They were frames, with basements. The basements were below the grade
52 of the street.

Cross-examined by Mr. PERRY:

Q. The date of this certificate, Mr. Duncanson, is the 3rd of April, 1877; was it signed by you on that day?

A. I was going to state to the judge, as he had not put it in, that that is a copy which I signed about two weeks ago. It contains about what I testified to all that time.

Q. But you stated that this paper which I hold in my hand was a copy prepared about two weeks ago.

A. That is a copy; yes, sir.

Q. That is, two weeks from this date?

A. About two weeks ago; yes, sir.

Q. Do you know who prepared it, sir?

A. The paper was brought to me, and I was asked whether I recollected making a certain certificate.

Q. Brought to you by whom?

52 A. By Mr. Dainese.

Q. Do you know whose handwriting it is?

A. That copy there is in my clerk's handwriting.

Q. Do you know who has the original?

A. I cannot say, sir.

Q. What has become of it?

A. Mr. Dainese is the gentleman I gave it to.

Q. You say here that there were six of these, and that four of them were unoccupied apparently at that time.

A. Yes, sir.

Q. Now describe more particularly the condition of those four, if you recollect.

A. Well, I don't know as I can give a very accurate description of them now.

Q. As compared with the other two?

A. I think there was very little difference in regard to their condition. I don't know as there was a great deal. It was possi-

54 bly like all unoccupied houses, a little more dirty, looking as if they hadn't been as well kept as an unoccupied house.

Q. What was the character of your inspection of these houses; did you go into them?

A. Yes, sir.

Q. Did you go through them?

A. Yes, sir.

Q. Did you go through these four that were not occupied; did you go into them?

A. If I remember aright, I didn't go through all of them. I think I went through one, possibly two, of them. I think my certificate in regard to the occupancy is more in respect to the rental, is it not?

Q. Did you notice the plan of construction of these four houses and the material of which they were constructed?

A. Yes, sir. I think all of them were made out of the same material.

Q. What was the character of that?

55 A. My impression is that they were second-hand lumber.

Q. Is it not a fact that all of those houses—these four that were unoccupied, at any rate—stood on piles; that the street had been filled up through there?

A. The street had been filled up; yes, sir.

Q. Did not all these houses stand on wooden piles?

A. Uprights.

Q. Well, uprights, or whatever you call them.

A. I can't say all of them; I think I remember seeing some.

Q. These that were unoccupied?

A. Yes; there were divisions between them—partitions.

Q. By what class of tenants were those two houses that were occupied tenanted?

A. I couldn't say now, from the fact of the lapse of time, not taxing my memory with it.

Q. Didn't they appear to be poor negroes?

56 A. Well, I can't state positively; they were naturally a class of tenants that would rent a house of that description.

Q. They were poor people?

A. Working people.

Q. You state here that these two houses that were occupied rented for about $15 each, as told you by the occupants?

A. Yes; that is the only knowledge I had of the rental.

Q. You stated a minute ago that this certificate was signed by you two weeks ago. Does it not represent your idea of the value of the property now, and not then?

A. No; I will say that I had not been up to see the property specially, or even casually, since the date of the certificate, and that was more for the purpose of calling to my recollection what I had certified to in 1877. That writing in that certificate was signed, I think, two weeks ago, when I hadn't viewed the property since 1877.

57 Q. You hav'n't seen the property, then, since 1877?

A. Not since that time; I have been up near there and seen it the same as you or anybody else would in passing it, but I hav'n't paid any attention to it.

Q. Do you know what that property was assessed at that time, April, 1873?

A. I do not, sir; I possibly did know what it was assessed at.

Q. Did you ever have occasion to sell any property in that square, or in that neighborhood, about that time, April, 1877?

A. I had a sale on the opposite side of the street, some time, I can't say whether it was that month or not—some vacant ground.

Q. Unimproved?

A. Unimproved; no, improved property; on 18th street, which wouldn't be a fair criterion; there was some improved sold on 18th street.

58 Q. Do you recollect what the property on the other side of the street, which you sold about that time, brought?

A. I think 26 or 29 cents a foot.

Q. How much would that be a lot?

A. That would be according to the front and depth of the lot.

Q. Have you any recollection of the aggregate of any one of those sales?

The WITNESS: Of those which I made?

Mr. PERRY: Yes; one lot.

A. If I remember, it was a twenty-foot lot front, or somewhere in that neighborhood, and a hundred feet in depth. But I couldn't state that as a positive fact without reference to the sale itself.

Q. Can you give a rough statement of what the total was of one of these lots?

A. Somewheres in the neighborhood of $600, if I remember correctly. It was sold for the trustee, and I believe the title
59 turned out to be a tax title, so that it was not a sale after all; at least the sale was not consummated.

Q. How many rooms did these houses have in them, do you remember? You say in your certificate that they were shingle roofs and two-story frame. Do you remember how many rooms they had in them?

A, Well, I can't say, positively, now how many rooms they had in them. At that time I could have told you probably better. My impression is that there were two rooms as you entered from the street; that is, one front and one back, and above that, I think, there were two more, and, possibly, a garret. Below it there was a basement.

Q. Were you present on the day of sale?

A. I was not. I knew nothing about the sale. I knew nothing about the merits of the matter when I made that certificate.

Redirect by Mr. CUPPY:

60 Q. What would be the difference, if any, between the relative value of the lot which you spoke of having sold and the other lots that you have been speaking of that you have inspected?

The WITNESS: In regard to the price of the ground?

Mr. CUPPY: Yes, sir.

A. There would be very little difference, if any. Possibly the east side would be worth a little more from the fact of being nearer Connecticut avenue.

Q. You are speaking now of the grounds only?

A. Of the ground only; yes, sir.

Q. What would be the difference, including the improvements?

A. For the difference in the price of grou-d the improvements would not be worth so much.

Q. You fix the value of these improved lots, including the improvements, at about $1,000?

A. I do, sir; that is, on such terms of payment as that
61 class of people would wish to buy.

Recross-examined by Mr. PERRY:

Q. Speaking of what this property would bring if sold on long

time, what terms do you mean by that; what terms and what amount cash?

A. I mean if there was about $150 to $200 cash paid, the balance being paid, possibly, in $20 a month.

Q. Twenty dollars a month; that would be $240 a year?

A. Yes, sir. I don't limit it to the $20 particularly, but from $20 to $25; along there.

CHAS. C. DUNCANSON.

Sworn to and subscribed before me.

H. H. ALEXANDER, *Examiner.*

62 EDWARD S. WESCOTT, a witness of lawful age, also produced at the same session and sworn and examined on the part and behalf of the complainant, as follows:

By Mr. CUPPY:

Q. What is your age and occupation?

A. I am 35; occupation, real estate agent.

Q. You live where?

A. My place of business is at the corner of 20th and I; I live at 2217 I street, in this city.

Q. Are you familiar with the property known as lot 17, square 140?

A. Yes, I know the property very well; at least I am familiar with the neighborhood. I have been around that neighborhood ten or twelve years.

Q. Your office is not very far distant from there?

A. Not very far; three or four squares.

63 Q. What examination have you made, and what do you know of the value of those several lots that are improved?

A. Well, I know this: I own property on the same square, and I judge of the value of that property very much by what I value my own. My house is a house something similar to the houses in question, and I value that piece of property at $2,000; at least I wouldn't care to sell it for any less money than that. I get $15 a mo-th rent out of it. The building association have put a value on it from time to time. They set a value and then they advance two-thirds of their value on the property. They assessed that ground some year or two ago at 25c. a foot, I think. That was their assessed value, but it was far below what it ought to be. In setting their value

64 they gave themselves a liberal margin.

Q. Now, you say that is what you fixed as the value of your own lot?

A. I fixed the value of my own lot at $2,000.

Q. What would you fix the value of these lots? There are four houses, I think, all four on lot 17.

A. Well, that ground is worth 50c. a foot along there, if not more money; it — worth fully that.

Q. Exclusive of the improvements?

A. Exclusive of the improvements.

Q. And what would you say inclusive of the improvements that are on there?

Mr. PERRY (to the witness): Instead of estimating the value by the foot, just estimate it by the lot; say, so much a lot.

A. If I owned that property there, I shouldn't care to sell it for less than $2,000, at a rental of $15 a month.

Mr. PERRY: Each house and lot, do you mean?

65 The WITNESS: Each lot. And I should want to inspect it pretty thoroughly before I would be willing to sell for that money. It is undoubtedly worth that, if not more; you see I have been called, and didn't have ten minutes' time to think over this matter, and I am giving you my crude thoughts possibly.

By Mr. CUPPY:

Q. I want to call your attention particularly to the four houses that are in the middle, that were purchased by Mr. Kendall.

A. I know the property in question.

Q. They are all four built on lot 17, I believe. What I asked you was what you would value each one of those tenements at, and the lot upon which it is built, and which is attached to it. Lot 17, as I understand, is divided up into four lots; that is, the lot as it appears on the plat.

66 A. Well, I govern the value very much by the rents. Can you inform me as to the amount of rent those houses bring?

Q. I do not know.

A. We gauge the value of anything of the kind by what it is worth to us in the way of rents.

Q. I speak of your general knowledge of property.

A. Well, I shouldn't think those houses would be worth as much as the adjoining houses—the two other houses. They have got flat roofs on them, and if any one has had experience with flat tin roof-they will know they are very hot in the summer. The other houses have pitched roofs, and they are much more comfortable; besides they are somewhat larger than the other houses. I should set the value of those houses at $1,600 or $1,800.

Mr. BROWN: Is that apiece, or for the whole of them?

67 The WITNESS: Each house. I hav'n't inspected the interior arrangements of them, and of course I couldn't state minutely.

By Mr. CUPPY:

Q. Do you remember whether or not these roofs were flat roofs originally, or whether they had been changed?

A. Well, that I couldn't testify to explicitly. I am not sure, but my impression is that all those houses had the pitched roof originally, and I am confirmed in my impression by having my attention attracted to those houses in passing them, noticing the change.

Q. And do you think that the change rather impaired the value or enhanced it?

A. Well, I shouldn't think it had increased the value of them; it has reduced the size of the property.

Q. I have been speaking of the present, somewhat. What
68 do you say was the value of those houses purchased by Mr. Kendall at the date of the purchase—the 26th of March, 1877?

A. Well, if those houses were the counterpart of the house we have been speaking of with the pitched roof, I should say that they were of equal value with these houses.

Q. And what do you think that was worth at that time?

A. I don't know; but at that time real estate was very much depressed. The houses have not been repaired very much from that time to this, and I should say that they [were] worth at that time about $2,000 apiece. I shouldn't have cared to dispose of them unless I had to do it at a sacrifice.

Cross-examined by Mr. PERRY:

Q. You say that you now own property on the same square in that neighborhood?

A. Yes.

Q. Did you own that property March 26th, 1877?

69 A. I have owned this piece of property about three years, if my memory is correct.

EDW'D S. WESCOTT.

Sworn to and subscribed before me—

H. H. ALEXANDER, *Examiner.*

70 CHARLES V. GARDON, a witness of lawful age, also produced, sworn, and examined at the same session on the part and behalf of the complainant, as follows:

By Mr. BROWN:

Q. Where is your residence?

A. My residence is 2303 M street northwest, in this city.

Q. Are you acquainted with the property known as lot 17, in square 140?

A. Yes, sir.

Q. Tell what connection you have had with that property.

A. In 1869 I bought the property from Mr. Dainese; on the 1st of December I gave Mr. Dainese $500 cash and three notes of $2,000 each, and took possession of the property.

Q. You are not the owner of the property at present?

A. Oh, yes, I am.

Q. Well, do you know anything in regard to the sale of the property in March 26th, 1877?

71 A. Yes; I was present at the sale.

Q. Will you tell what took place at that time?

A. There had been a sale on the opposite side of the street, and Mr. Waggaman was the auctioneer. Mr. McPherson and Mr. Kendall and Mr. Waggaman, with a lot of other persons whom I didn't know, and the people in the neighborhood, the tenants out of the

houses, and one thing another, were around there. When the sale commenced it commenced to rain, and it was sold during the rain. Mr. Kendall first bid $250 a house. Mr. McPherson said that they shouldn't go at that; that he wouldn't let them go at that. Then Mr. Kendall had to bid $500, and he bid the four in at $500 each, there being no others to bid.

Q. Do you think that was a fair value of the property?

A. No; the property was worth then a thousand dollars.

72 What they were sold for was just about half their value.

Q. There is an allegation in this bill in regard to some protest that was read at the sale. Do you know anything about that?

A. Yes; just as the sale commenced I read a protest protesting against the sale, and told them that I would carry the thing into court if they sold. They paid no attention whatever to me; just went on and sold it as I have described to you.

Q. You say that this was not a fair value of the property that it sold at. Have you any reasons for accounting for the sale of the property being so low?

A. The only reason is there was nobody to buy—no bidders there. It could bave been bought by Mr. Kendall for $250 a house if the trustee had suffered it to be sold at that. There was no one there to bid it in.

73 Q. You are acquainted with the value of real estate in that locality?

A. Yes, sir; I know about that property. I don't know much about property generally. I have been living here all my life, except a short time when I lived in Prince George's county; but, then, I was in town every day.

Cross-examined by Mr. PERRY:

[Q.] Mr. Gordon, is it not a fact that the rain had ceased before the sale began; that it had been cloudy and showery that morning, but that the rain had ceased?

A. No, sir; it was raining at the very moment the crying was going on, and it was raining when I read my protest.

Q. What did you read as the grounds of your protest?

A. Why, I read the ground that the times were bad, and

74 that it was not a fit occasion to sell, and the weather was bad, and all that kind of thing. I wrote the protest and came right down just as soon as I heard of it.

Q. What do you mean by the times were bad?

A. Well, the times were bad, money was scarce, and people were generally used up; nobody could buy property, and property wouldn't sell.

Q. Well, then, property was very much depressed at that time, wasn't it.

A. It was somewhat depressed at that time, sir.

Q. Who put those houses up; who built them?

A. They were built under Mr. Dainese. He bulit them.

Q. Were they not built out of lumber that was taken out of hospitals?

A. I don't know where the lumber came from, but I rather suspect that it was second-hand lumber. I didn't see them when
75 they were being built, and I don't know where the lumber came from, but my impression is that they were all built with second-hand lumber.

Q. What was the character of the foundation of the house; weren't they built on piles, or sticks?

A. They were built on piles, just like Shepherd's five houses there. They were supported in that way. They drove piles there and supported those brick houses on them. You can build a house on piles just as well as you can anything else; it don't affect the houses in the least being put on piles.

CHAS. V. GORDON.

Sworn to and subscribed before me.

H. H. ALEXANDER, *Examiner.*

76 FRANCIS DAINESE, the complainant, also produced, sworn and examined on his own part and behalf, at the same session, as follows:

By Mr. BROWN:

Q. Where do you live?

A. I live at 1303 18th street, northwest.

Q. Are you familiar with the houses built on lot 17, square 140?

A. I am, sir; because I built them myself, and I know all about the property.

Q. Just go on and tell in regard to the nature of the property; what kind it is, and so on.

A. I built these houses in 1868, all of the same size, same form, and same structure; four of them on lot 17, and the other two on one-half of lot 16, in square 140. In other words, the two lots were 75 feet front by 90 feet deep, or thereabouts—a fraction less. They were divided into six houses precisely the same, built on piles, or uprights, with stone foundation at the bottom all
77 around, and also under the partitions. They cost me $1,500 each, or $9,000 for the block of houses. The four standing on lot 17 I sold to Mr. Gordon, as he testified, in 1869. The other two I sold to Mr. Albert Cingria. The four that I sold to Mr. Gordon, Mr. Gordon paid me $500 cash, and gave me three notes, payable in one, two, and three years.

Q. That part is all set out in the bill, and not denied. Just go on and tell what kind of property it is.

A. The kind of property is four-room houses, one kitchen, and a large basement underneath each house. The basement underneath occupies the whole length of the house, which is equivalent to two rooms. The four houses that Mr. Kendall has now, were sold, as I understand—

Mr. PERRY, (Mr. Brown interposing). Then you need not state it. Only state what you know of your own knowledge.

78 The WITNESS: The four houses that have been altered by Mr. Kendall by putting a flat roof over them and filling the

basement and thereby reducing the size of the houses, considering which, at present they do not bring so high rent as they brought before, as the other two houses bring. The two that were sold to Mr. Cingria are still under their old roof, which is a pitched roof. They still rent at $15 each.

Cross-examined by Mr. PERRY:

Q. Do you still own them?

A. No, sir; I do not own them. I sold them long ago to Mr. Cingria, as I have said; but I know what they rent for, because Mr. Gordon is Mr. Cingria's agent and he continued to rent them at that price.

Q. You say that those houses when you built them in 1868 cost you $9,000?

79 A. The whole block of six houses; those that Mr. Kendall has altered and the two that Mr. Cingria bought.

Q. You state that those six houses, ground and all, cost you $9,000?

A. $9,000. They run $1,500 each house.

Q. That included the ground as well as the house?

A. That included the ground as well as the house.

Q. You spoke of the cellars in these houses?

A. I spoke of the basement.

Q. One minute. You spoke of the basements in these houses. Were the basements of the two houses which you sold to Mr. Cingria generally occupied?

A. Yes, sir.

Q. Are they occupied now?

A. They are occupied now, at least one of them is occupied now. No. 1145 is occupied. I don't know whether the other is occupied or not.

80 Q. What rent did you get for those two; the two that you sold to Cingria?

A. I don't get the rent.

Q. Do you know what rent?

A. Yes.

Q. State it.

A. $15 a month.

Q. For the whole house?

A. $15 a month for No. 1145.

Q. Each house?

A. Yes, sir; for No. 1145.

Q. Hasn't the street been raised along there since those houses were built?

A. Certainly.

Q. Now isn't the effect of the raising of the street to put the basement some three or feet under ground?

A. The basements are under ground, but still they are occupied.

Q. How much under ground?

A. I don't know how many feet they are under ground. I think

about four feet or something like that; but they are occupied.

81 Q. Are you still interested in any way in the two houses which you say you sold to Cingria?

A. No, sir. I sold those houses with all my other property under mortgage, and, therefore, I have no interest in them. But I am interested in setting aside this sale, because I hold one of the notes.

Q. Are you not the agent of Albert Cingria for receiving the rent of those houses?

A. Mr. Gordon is the agent for Cingria.

Q. Do you receive the rent for those houses for Albert Cingria?

A. Well, since Mr. Gordon has got an office under the Commissioners he cannot occupy himself with it, and he charges me temporarily with it.

Q. How long have you been the agent?

A. Oh, only about a month, or less than a month. Mr. Gordon wanted Mr. Cingria to appoint another attorney about a

82 month ago, because his occupation did not permit his continuing in that capacity.

Q. What relation is Mr. Cingria to you?

A. He is a nephew of mine.

Q. Is Mr. Charles V. Gordon related to you at all?

A. No, sir.

Redirect by Mr. BROWN:

Q. You are not authorized by Mr. Cingria to rent?

A. No, sir. I have no authority whatever. Mr. Gordon requested me at the office of the Commissioners to assist him to continue until Mr. Cingria would appoint some other attorney.

Recross-examined by Mr. PERRY:

Q. Where is Mr. Cingria now?

A. I don't know.

Q. Don't you send him his rents since Mr. Gordon received this appointment?

83 A. I have told you that Mr. Gordon collected his rents and sent them to him.

Q. But you said within the last month, since Mr. Gordon's appointment, you have assisted?

A. Well, it isn't a month yet, because I havn't received anything yet, and if I do, I will have to return the rents to Mr. Gordon, and he will return them to his principal. I have no personal interest in the concern.

F. DAINESE.

Sworn to and subscribed before me.

H. H. ALEXANDER.
Examiner.

Adjourned.

84 [In pencil:] 20.

Defendants' Testimony. Depositions on Behalf of Defendant, John E. Kendall. William W. Wishart, Examiner in Chancery.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520.

85 *Depositions in Behalf of Defendants.*

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520.

Before W. W. Wishart, examiner in chancery, March 14th and 17th, 1881.

Witnesses.	Direct.	Cross.	Redirect.	Recross.
John D. McPherson	88	92	95	×
Thos. E. Waggeman	97	99	------	
John E. Kendall	100	107 and 111	108 and 109	
Hiram S. Litchfield	113	117	------	

86 In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINES
vs.
JOHN E. KENDALL *et al.* } No. 5520.

DISTRICT OF COLUMBIA, *ss:*

Be it known that at an examination of witnesses begun and held on the 14th day of March, A. D. 1881, and continued on the 17th day of March, A. D. 1881, the depositions hereto attached were taken. I, William W. Wishart, an examiner in chancery, did cause to be personally present at the office of R. Ross Perry, Esq., No. 342 D St. N. W., in the city of Washington, in said District, John D. McPherson, Thos. E. Waggeman, John E. Kendall, and Hiram S. Litchfield, to testify on the part and behalf of the defendants in a certain cause now pending in the supreme court of the District of Columbia, wherein Francis Dainese is complainant and John E. Kendall *et al.*, defendants.

87

DISTRICT OF COLUMBIA, *ss:*

I, William W. Wishart, examiner in chancery, do hereby certify that, in pursuance of the agreement between counsel, the depositions

hereto attached were taken down by me and reduced to writing in the presence of counsel for the parties respectively within noted, and in the presence of, and from the oral statement of, the witnesses at the time and place designated in the caption above, and after the same had been reduced to writing were read over by the witnesses, and by them subscribed in my presence, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter at issue in said cause.

I further certify that I am not of counsel for any of the par-
88 ties to said cause, or in any manner interested therein.

WILLIAM W. WISHART,
Examiner in Chancery.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL *et al.* } No. 5520.

MARCH 14TH, 1881.

Met pursuant to agreement at the office of R. Ross Perry, Esq., No. 342 D St. N. W., at 10 o'clock a. m.

Present: Chapin Brown, Esq., of counsel for complainant; and Walter S. Perry, Esq., of counsel for defendant.

Whereupon JOHN D. MCPHERSON, a witness of lawful age, produced on behalf of defendants, being duly sworn, deposes as follows:

My name is John D. McPherson; am an attorney-at-law, and a resident of the city of Washington.

89 1 Q. You were trustee of a deed of trust of date the 1st day of December, 1869, in which Charles D. Gordon conveyed to you lot 17, in square 140, to secure Francis Dainese of an indebtedness of $6,000.00. State whether or not you made a sale under that deed.

A. I did make a sale under that deed on or about March, 1877.

2 Q. By whose order was that sale made?

A. At the request of Mr. John E. Kendall, who held two of the notes secured by that deed.

3 Q. What transpired at the sale?

A. At the sale there was but a small crowd of people present; no bid was made as high as $500.00 for any house. Mr. Kendall made a bid which would have aggregated something less than $2,000.00 for the whole property. I announced that I would not sell unless I could get $2,000.00, whereupon Mr. Kendall increased his
90 bid to that sum, and the property was knocked down to him.

4 Q. What was the state of the weather at the time of the sale?

A. The morning had been rainy, but at the time of the sale, and for some little after the sale, there was no rain falling.

5 Q. Had you made the usual advertisement of the sale in the papers?

A. I had advertised the sale in conformity with the deed of trust.

6 Q. Was there a protest read at the sale by any one?

A. There was a protest read by Mr. Charles Gordon.

7 Q. What effect, in your opinion, had that protest on the sale as to bidders?

A. I have no reason to believe that it deterred any one from bidding in point of fact. I should think that such a protest would entirely deter one from bidding.

91 8 Q. Had you ever attempted to sell this property under this deed before?

A. I think I had advertised it and gone on the ground for the purpose of selling once before, and the sale was stopped by some arrangement between the parties.

9 Q. Did you have the property cried on that occasion?

A. I think so.

10 Q. Did you get any bids?

A. That I don't remember. My attention has not been called to that first attempt, and I don't recall the circumstances instantly.

11 Q. Is that a correct copy of your advertisement for the last sale?

A. I presume it is, as it is cut from the newspaper, except as to the date.

Advertisement here offered in evidence, the same being the advertisement contained in the original bill in the case of Gordon *vs.* McPherson *et al.*, No. 5339, in equity.

92 12 Q. In your opinion, was the price for which the property was sold a fair price?

A. In my opinion, at that time it was as much as the property would bring at an auction properly conducted. It was, in my opinion, as much as I could then get for the property at auction.

Cross-examination by Mr. BROWN:

13 Q. Mr. McPherson, you stated in your testimony that you sold the property at the request of Mr. Kendall, who was the holder of two of the notes; who was the holder of the other notes?

A. There was only one other note, which I understood was held by Mr. Dainese.

14 Q. How many persons were present at the sale at the time?

93 A. I can hardly state; I might guess about six or seven. I will add there was a sale going on on the opposite side of the street, and I think some of them may have walked over; but my recollection as to that is very indistinct.

15 Q. Do you remember the amount of the first bid made on the property?

A. No; I do not.

16 Q. As a matter of fact, Mr. McPherson, was not the rain falling at the time of the sale?

A. I don't think any fell at the time of the sale. There may have been a few drops. It was very cloudy and threatening, and I expected rain to fall. The weather was very threatening as regards

rain. The property was in bad condition. The notes were long over due, and I knew there was a difficulty between the gentleman concerned, and I thought that the matter ought to be closed, and that it was my duty to proceed.

17 Q. Mr. McPherson, don't you think that if the day had
94 been more favorable, and the terms of sale had required a small cash payment, and the balance in small monthly payments at short intervals, that the property would have brought a higher price?

A. If the day had been so favorable that, as sometimes happens, a larger crowd had come together from curiosity, there would, of course, have been a chance that some one might have been present who would have been tempted by the low price of the property to have purchased it. As regards the second branch of the question, I say the smaller the cash payments and the longer the terms, the higher the price, perhaps, that may be given.

18 Q. Mr. McPherson, you say that the property was struck off to Mr. Kendall for $\$2{,}000\frac{00}{100}$. Have the terms of sale ever been complied with.

Objected to by Mr. Perry on the ground of irrelevancy.

95 A. Mr. Kendall made a cash deposit of $25 for each house, as required by the terms of the advertisement—that is, $\$100\frac{00}{100}$—and that is all that I know now that he paid. I think he must also have paid the expenses of the sale, advertising and auction fees. He has never complied further with the terms of sale.

Redirect examination by Mr. PERRY:

19 Q. The sale which you spoke of on the other side of the street, was that being conducted at the same time as your own?

A. It must have been fixed for very nearly the same hour; probably a little later.

20 Q. Was that sale stopped by the state of the weather?

A. I left the ground before the sale actually took place, but when I left the crowd was still there.

21 Q. Have you not been trustee in an immense number
96 of cases of this sort?

A. I have not.

JNO. D. McPHERSON.

Subscribed and sworn to before me—

W. W. WISHART, *Examiner.*

97 THOMAS E. WAGGEMAN, a witness of lawful age, also produced at the same session on behalf of defendants, being duly sworn, deposes as follows:

Direct examination by Mr. PERRY:

22 Q. Your name is Thomas E. Waggeman; you are a real estate agent and auctioneer; you have been in that business about fifteen years?

A. Yes.

23 Q. Did you make a sale of lot 17, in square 140, on the 26th of March, 1877?

A. I did.

24 Q. How was that sale made, and what was the property sold?

A. The sale was made in the following order, John E. Kendall being the purchaser: No. 1155, 500_{100}^{00}$; No. 1153, 500_{100}^{00}$; No. 1151, 500_{100}^{00}$; No. 1149, 500_{100}^{00}$. That is, there were four houses, and they were sold separately for 500_{100}^{00}$.

98 25 Q. What was the state of the weather at the time of the sale?

A. It was cloudy.

26 Q. How many people were present at the time of the sale?

A. Very few.

27 Q. Was the sum the property brought, in your opinion, a fair price for it?

A. I think it was.

28 Q. You are familiar with property in that location?

A. I am.

29 Q. Who paid you your fee for selling and the costs of advertising?

A. I received a 100_{100}^{00}$ deposit from Mr. Kendall, and after deducting my bill I sent balance by check to the trustee, Mr. McPherson.

30 Q. In your opinion, was that a fair sale?

A. It was.

31 Q. And the property brought all it — worth?

A. I think it did.

99 Cross-examination by Mr. BROWN:

32 Q. Mr. Waggeman, don't you think that if the day had been mor- favorable, and the terms of sale had been a small cash payment and the balance in small payments at short intervals, that the property would have brought a higher price?

A. I don't think so.

W. E. WAGGEMAN.

Subscribed and sworn to before me—

W. W. WISHART, *Examiner.*

100 JOHN E. KENDALL, a witness of lawful age, also produced on behalf of defendants, being duly sworn, *and* deposes as follows:

Direct examination by Mr. PERRY:

33 Q. Your name is John E. Kendall, and you are a resident of the city of Washington and one of the defendants in this case?

A. I am.

34 Q. Do you remember a sale of lot 17, in square 140, on the 26th of March, 1877?

A. I do.

35 Q. Were you present at the sale?

A. I was.

36 Q. State what transpired.

A. Myself, Mr. Waggeman, and Mr. McPherson were present, together with quite a number of other people, among whom was Mr. Charles V. Gordon. As the sale was about to begin Mr. Gordon read a notice of protest against the sale, notwithstanding which the
101 sale was carried on, and the property was struck of- to me at the price of $\$500\frac{00}{100}$ for each of the four lots on which they stood. It had been raining somewhat during the day, but it did not rain at the time of the sale, nor after we got on the ground before the sale.

37 Q. How many people were there?

A. I didn't count them; but there were some twenty or thirty people present, and there was a sale of property on the opposite side of the street immediately after.

38 Q. There is a power of attorney referred to in the bill of complaint given you by Charles V. Gordon. What has become of the original of that paper?

A. The original was filed in a suit at law of myself against Mr. Dainese on one of the notes secured on this property.

39 Q. Is that a correct copy of that paper?

102 A. I believe it is.

The following paper is offered in evidence:

Exhibit of J. G. P. No. 2 of Report of Referee.

In the Supreme Court of the District of Columbia.

JOHN E. KENDALL
vs.
FRANCIS DAINESE. } At Law. No. 13391.

WASHINGTON, DIST. OF COL., *June* 1, 1873.

Know all men by these presents, that I, Charles V. Gordon, do hereby nominate and appoint John E. Kendall, of Washington, D. C., my agent and attorney-in-fact to collect and receipt for, in my name, all the rents, profits, and issues of and from my four houses on lot No. 17, in square 140, according to the plat or ground
103 plan of the city of Washington, rent the same if vacated, and for these purposes to have the management of said property, and to apply the proceeds, less five per cent., to be retained by him as commissions, as follows: First, in keeping the property properly insured; second, in payment of the expenses of late advertisements and attempts to sell; third, in payment of the debt secured by deed of trust made by me to John D. McPherson.

In testimony of all of which I have hereunto set my hand and seal, on the day and year first above written.

CHAS. V. GORDON.

40 Q. When did you take possession of the houses under that power?

A. About the date of it.

41 Q. What was the condition of the houses at that time?

104 A. They were in a very bad condition, but tenable. They had been built on piles, originally were three-story house-, but the corporation of Washington had filled up 19th street about 12 feet, making them basement houses, deep under ground, and the basements entirely useless for living purposes. At the time I took possession of them the basements were not used at all, except for fuel, and I think water stood in the cellars after a heavy rain till it had evaporated or soaked away. The first floor, or second story you might call it, is now about 3½ feet below the grade of the street, being terraced about five feet away from the houses.

42 Q. Did you turn these houses over to a real estate agent after you came into possession of them under this power of attorney?

105 A. I authorized Mr. Thos. E. Waggeman to collect the rents. He has done so all the time, and is now doing it.

43 Q. Did you understand this power of attorney gave you authority to make repairs?

A. I understood the power of attorney to give me no authority whatever to make repairs.

44 Q. Have you, since the sale in 1877, repaired the property; if so, to what extent and at what expense?

A. Immediately after the sale I got bids from two different carpenters for the repair of the property, that is, for all four houses. The repairs were made at the cost of something over $2,000.00.

45 Q. Were all the repairs made of a necessary character?

A. I considered them so. They were in so bad a condition at the time they were sold that they were entirely untenable.

106 46 Q. It is charged here in the bill that while these houses were in your possession, that you permitted them to become dilapidated and out of repair, and a place of deposit for excrement and filth?

A. I had no authority to make any repairs, and I stated that the owner was entirely responsible for the dilapidation and want of repair.

47 Q. It is also charged that at the time Gordon gave you this power of attorney, it was expressly stipulated between you that this property should not be sold under this deed. What do you say as to that?

A. There was no such agreement of any kind or description, on the contrary, it was left free to me to sell the property under the deed of trust whenever I thought proper. In drawing the power of attorney, whoever drew it embodied a clause prohibiting me from selling

107 the property under the deed of trust, and requiring that I should be satisfied with taking the rents to pay the debts, which I repudiated emphatically, and told Mr. Gordon that unless the arrangement was consummated to my satisfaction, leaving me free to collect the rents as long as I pleased and sell the property when I pleased, unless the debt was paid, I would have nothing to do with it, and would sell the property to the best advantage I could.

48 Q. What was done then?

A. Then they sent me the power of attorney now in evidence.

Cross-examination by Mr. BROWN:

49 Q. How much did each house rent for a month from the time you took possession under the power of attorney until the property was sold on March 26th, 1877?

A. I think it was $15.00 a month.

50 Q. Did it rent for any more than that amount after the
108 sale, and after the repairs were made?

A. It did not. It was not tenable at all at the time the sale took place.

51 Q. How many houses were rented at the time of the sale?

A. There *was* none of them rented, but one was occupied.

52 Q. Have you the contracts made by the two carpenters for their repairs to the property?

A. I have it somewhere among my papers.

53 Q. Will you state the names of the carpenters?

A. H. S. Litchfield and S. M. Plumbly.

Redirect examination by Mr. PERRY:

54 Q. How many of these houses were rented during the time between this power of attorney and the time of sale?

A. They were rented most of the time down to a short period before the time of sale.

109 Adjourned at 1 o'clock p. m. to meet Thursday, March 17th, 1881, at 10 o'clock a. m., at the office of R. Ross Perry, Esq.

Met pursuant to adjournment.

Present: Chapin Brown, Esq., counsel for complainant, and Walter S. Perry, Esq., counsel for defendants.

Whereupon JOHN E. KENDALL, recalled on behalf of defendants, deposes as follows:

I stated the other day, in answer to question, How many houses were rented at the time of the sale? (page 19, question 51,) that none *was* rented, but one was occupied. The correction is, that one was rented, and the rent was paid to the 1st of April, 1877, as shown by the reports of Mr. Waggeman. I also stated somewhere that these houses rented for $15.00 a month when I took
110 possession of them I find by Mr. Waggeman's reports that one of them was rented at $12.00 a month; the other three I rented at $15.00 down to about September, 1876, when they were reduced to $12.00, and, notwithstanding no authority was given in the power of attorney to make any repairs, some were made, which were necessary to keep tenants in the houses. These houses were advertised to be sold on the 21st of April, 1873. There being no bidders, the sale was postponed until the 30th of April, 1873, when there were no bidders and no persons present, I think, except myself, the auctioneer, Mr. Thos. E. Waggeman, Mr. John D. McPherson, trustee, and Mr. Francis Dainese. After the property had been offered for sale, and no bidding was made, it was suggested to me, by either Mr. Waggeman or Mr. McPherson, as I

thought, coming from Mr. Dainese, that I should undertake
111 the collection of the rents of these houses until some future period, which I consented to do. In preparing the first power of attorney, a clause was included which prevented me from selling the houses under the deed of trust. making me rely entirely on the rents and proceeds to pay the debts secured by the deed of trust. This paper I found on my desk, and, as Mr. Gordon was then living in Maryland, I took it to Mr. McPherson, as trustee, stating to him that I would not be restricted from selling the property at any time I pleased. This is in correction of testimony given on Monday, the 14th of this month, where I say that this conversation took place with Mr. Gordon.

Cross-examination by Mr. BROWN:

Q. Mr. Kendall, you say that it was suggested to you by
112 Mr. Waggeman, as coming, as you think, from Mr. Dainese, that you take the collection of rents in payment of your debt. Did you know that that suggestion came from Mr. Dainese?

A. I did not; but as he was present and Mr. Gordon was not, I concluded, from the difficulty of obtaining bids, and as he had, prior to that, bigged for delay in the sale of the property, I believed that the sale made by him to Gordon had not been a *bona fide* sale, and that he was just as much interested in the property as he ever had been before the, what I thought, pretended sale to Gordon.

JNO. E. KENDALL.

Subscribed and sworn to before me—

W. W. WISHART, *Examiner.*

113 HIRAM S. LITCHFIELD, a witness of lawful age, produced on behalf of defendants, being duly sworn, deposes as follows:

Direct examination by Mr. PERRY:

52 Q. State your full name, residence, and occupation.

A. My name is Hiram S. Litchfield; residence, No. 724 7th St. southwest; occupation, carpenter.

57 Q. Are you a builder?

A. I am.

58 Q. How long have you been a carpenter and builder?

A. Since 1863.

59 Q. State whether or not in the spring of 1877 you were employed to make repairs on certain houses on the east side of 19th St., between L and M N. W., in this city.

Mr. Brown, counsel for plaintiff, objects to all testimony relating to all repairs and improvements to the buildings in question that were made after a sale of the property on the 26th of March, 1877.

114 A. I was.

60 Q. What was the nature of those repairs, and how much were you paid for them?

A. Well, it was general repairs and improvements to the build-

ings, so as to make them tenantable. As near as I could recollect the price was about $2,150.00.

61 Q. Were the repairs all of a necessary character?

A. I considered them so.

62 Q. In the course of these repairs what, if anything, was done to the roofs of these houses?

A. The roofs were taken off and made flat, or nearly flat, and a tin roof put on.

63 Q. Why was that done?

A. When we applied for a permit to the inspector of buildings to make repairs he refused to grant a permit to repair shingled roofs.

Counsel here offers in evidence building regulations of the District of Columbia, section thirteen (13), pages seventeen (17) and
115 eighteen (18).

64 Q. What repairs, if any, did you make in the foundation walls?

A. I built a fourteen (14) inch wall all around under the buildings, and also party walls of the same thickness.

65 Q. Was that done under the building regulations?

A. It was done by direction of the inspector of buildings.

Counsel here offers in evidence building regulations of the District of Columbia, section nine (9), page eleven (11).

66 Q. How come you to undertake this contract for repairs? Was it made by bid?

A. It was.

67 Q. Did you inspect these houses before you made the bid?

A. I did.

68 Q. Are you familiar with the neighborhood?

A. Can't say that I am.

116 69 Q. Are you familiar with the values of property in that section of the city?

A. I believe I am.

70 Q. Would you regard $2,000.00 as a fair value for these four houses and lots, that is, $500 for each house and lot, when sold at public auction?

A. I should think that was all that they were worth.

71 Q. Do you regard property of that description in that locality as desirable property?

A. I do not.

72 Q. Have you had much experience in the buying and selling of real estate in this city and in building operations?

A. I have.

73 Q. For how long a time and to what extent?

A. Well, for twelve (12) or fourteen (14) years, and over a quarter of a million of dollars.

74 Q. State as near as you can the date at which, in the year 1877, you inspected these buildings for the purpose of making
117 your bid and the date at which you began the repairs.

A. I inspected the buildings about the middle of April and began the repairs about the first of May.

Cross-examination by Mr. BROWN:

75 Q. Mr. Litchfield, would you term the work done on these building- improvements or repairs?

A. Well, most of the work I should consider repairs, but the filling of the lots I should consider improvements.

76 Q. How about the alternation to the roof?

A. Well, that was only repairs.

77 Q. To what extent had the roof become impa-red?

A. Well, to such that they could not be patched with shingles; that is, they had been impa-red to more than one-third of their value.

78 Q. Were the roofs originally built of combustible material?

A. They were.

118 79 Q. Was the price for which they were repaired the cheapest at which it could be done in order to render the houses tenantable?

A. Well, yes, to make them really tenantable and desirable to rent.

80 Q. In your opinion, would the repairs or improvements increase the rent of the house per month?

A. It would.

81 Q. Is it customary to repair houses to an amount equal to their value?

Objected to by Mr. Perry as irrelevant.

A. With houses like those, if they ever are repaired, I think it is customary.

H. S. LITCHFIELD.

Subscribed and sworn to before me—

W. W. WISHART, *Examiner.*

119 *Testimony in Rebuttal in Behalf of Complainant.*

WASHINGTON, D. C., *March 29th*, 1881—3 p. m.

Met pursuant to adjournment—present, Mr. Brown, of counsel in behalf of complainant, and Mr. Perry, of counsel in behalf of defendants—whereupon GEORGE H. FARNDELL, a witness of lawful age, was produced, sworn, and examined on the part and behalf of the complainant, as follows:

By Mr. BROWN:

Q. Please state your residence and occupation.

A. 1336 22nd street; I am a granite stone cutter by trade.

Q. Are you acquainted with the property situated on lot No. 17, square 140?

120 A. Yes, sir.

Q. What connection have you had with the property, Mr. Farndell?

A. I was watchman over it at the time it was building.

Q. Did you have any acquaintance with the property after that?

A. Yes; I was private watchman for Mr. Dainese.

Q. Did you have any connection with it when it was owned by Mr. Gordon?

A. No, sir; I had nothing to do with it after that.

Q. Did you know the condition of the property at the time it was sold, on March 26th, 1877?

A. Yes, sir; I have a very good idea what it was.

Q. In what condition was the property at the time it was sold under the deed of trust?

Mr. PERRY: Objected to on the ground that it is a subject of examination proper for examination-in-chief, and not examination in rebuttal.

121 A. Well, it was in good tenantable condition.

Q. What was the condition of the property when it was turned over to Mr. Kendall under the power of attorney, when Mr. Kendall took possession of it?

A. I don't know anything of Mr. Kendall.

Q. You remember when Mr. Waggaman collected the rents?

A. Yes; he collected the rents for Mr. Gordon.

Q. In what condition was the property at that time?

A. It was in good condition then; it was occupied.

Q. To what extent had the property become impaired at the time of the sale under the deed of trust; had it become impaired to one-third of its original value?

A. No, sir.

Q. Did you know the property at the time the improvements were *were* put on it by Mr. Kendall?

122 A. Nothing more than seeing them working on it when I passed by. I passed by when they were at it, but never went close to it to pay any attention to it.

Q. Did you know the condition of the roof at that time?

A. The roof for these houses was built all the same, and the roof was on two of them still that was on first.

Q. How much had the roofs become impaired at the time these improvements began?

A. Not more than ordinary wear and tear.

Q. Had they become impaired to one-third of their original value?

A. No, sir.

Q. Did you know the general nature of the repairs that were made at that time?

A. I know he put a tin roof on instead of a pitch roof—a flat roof.

Q. Were any other repairs made at the time?

123 A. He put brick walls in the cellar where it was wood work before. But there is no floors in the cellars now where there was floors before.

Q. Were those brick walls necessary in order to render the houses tenantable?

A. No, sir; the houses was tenantable without that; that is, the last I seen of them.

Q. Well, would you consider these repairs or improvements all of a necessary character?

A. No, sir; I don't think there was any necessity for so much expense; none at all.

Q. What was the character of the lumber out of which these houses were built?

A. First-class. It was second-hand lumber, but it hadn't been in the Government buildings a year.

Q. Was it as good lumber as is generally used in building houses?

124 A. It was certainly good lumber, for it was well seasoned. The front weather-boarding came from the lumber yard. It is narrow six-inch stuff, and the same is on yet.

Q. Well, was the other lumber as good as is usually put in houses?

A. Yes, sir.

Cross-examined by Mr. PERRY:

Q. Had you anything to do with these houses except to be a watchman for them?

A. I had charge of all the materials, and then I had charge of the sanitory part of them.

Q. Do you know where the lumber out of which the houses were built came from?

A. Yes, sir.

Q. Where?

A. Giesboro' Point.

Q. What was it used for there?

A. Government barracks.

Q. How did Mr. Dainese get it? Were the barracks con-

125 demned and sold?

A. The war was ended, and the barracks had never been used. They were the last ones that had been built.

Q. When did your connection as a watchman of these buildings come to an end?

A. When Mr. Dainese sold them to Mr. Gordon.

Q. Was not that in 1869?

A. I couldn't say whether it was 1868 or 1869. I hav'n't got the date here.

Q. Since that time have you had any connection of any description with these buildings?

A. For the other part of the property I had the collecting of the rents directly after I got the power of attorney from Mr. Gordon.

Q. What do you mean by "the other part of the property"?

A. The other two houses. There were six of them built in the row together.

Q. Were you a builder by occupation; a carpenter?

126 A. No, sir; I am a stonecutter.

GEORGE H. FARNDELL.

Sworn to and subscribed before me—

H. H. ALEXANDER, *Examiner.*

127 CHARLES V. GORDON, a witness previously examined on the part and behalf of the complainant, recalled and examined in rebuttal as follows:

By Mr. BROWN:

Q. When the power of attorney was given by you to Mr. Kendall was there any understanding in regard to the sale of the property; if so, what was it?

A. When I gave the power of attorney to Mr. Kendall there was an understanding that he was to keep the property in repair, so that it could be rented to pay the debt.

Q. In regard to the sale of the property, was there any understanding?

The WITNESS: What do you mean by the sale?

Mr. BROWN: It was testified somewhere by Mr. Kendall that when the power of attorney was given there was an understanding that he would be permitted to sell the property at any time?

128 A. Oh, it was not so. When I gave him the power of attorney it was with the distinct understanding that he was to collect the rents and pay the debt; that is in my original declaration.

Q. Was there any understanding that he should not sell the property?

A. He was not to sell the property. I gave him the property with a view to collect the rent and pay the debt; it was for my advantage. Had he continued to collect the rents up to this time I should have owned the property nearly.

Q. It was not expressly understood that he should not sell the property, was it?

A. It was understood. We did not have any conversation in reference to his right to sell the property under the power of attorney. He simply took the power of attorney with a view to collect the rent and pay the debt; and that was the understanding—

129 that he was to pay the debt. Mr. Kendall was to keep the property and collect the rents and pay the debt, and then the property was to come to me; that was the understanding. There was no idea of selling, or anything of that kind.

Q. Have you had any experience in repairing houses?

A. Yes, sir; I have had all my lifetime more or less experience in repairing property.

Q. Do you know the nature of the repairs, or improvements, that were put on this property?

A. Yes, sir; I watched them while they were putting them on; I was down there at least three times a week.

Q. Would you consider the repairs that were put on the property, after it was sold under the deed of trust, necessary for it?

A. No; it was just a mere fancy of Mr. Kendall; it was totally unnecessary.

130 Q. Did the property need repairing at the time?

A. The property needed some repairing at the time.

Q. What amount do you think would have been a fair allowance for that purpose?

A. Well, two or three hundred dollars; probably a couple of hundred dollars.

Q. Would you call the work that was done on those houses improvements or repairs?

A. Well, I don't consider it improvements at all; I consider the removal of the old roof and the depriving of the buildings of the basement as an injury.

Q. Would it be of a character, do you think, to increase the rent?

A. No; it was not of a character to increase the rent, because the rent has never been increased. They were renting for $15 when I let him have them, and they are not renting for more than $12 or $13 now.

131 Q. You have been agent for the houses adjoining these, and that were a counterpart of them?

A. Yes; I was an agent of Mr. Cingria, and these two houses were two of the six that were built. Four of them Mr. Dainese sold me, and these two he sold to Mr. Cingria, and I afterwards became the agent for those two.

Q. Now, with regard to the repairs of those two houses, what is the amount of repairs that have been put on them since they have been built, do you know?

A. I do not know. I know that $100 would cover all the repairs that have been put on them.

Q. And they are still in good condition?

A. Yes; in good condition, and rented.

Q. Are the rents still as high as ever?

A. The house that has been vacated, that was occupied by

132 the Comptons, we got $16 for.

Q. Until how recently?

A. About two months.

Cross-examined by Mr. PERRY:

Q. How much do you get now for the other house of the two that you are agent for?

A. I am not agent now. I gave it up. I turned it over. The rent that I got for the other two was $16 from the Comptons, and the other one—I have forgotten what it rented at.

Q. You have forgotten what it rented for?

A. Yes, sir.

Q. Did you collect the rents?

A. I collected the rents. I lowered it on two or three occasions for the simple reason that Stone's murder had been committed there, and I couldn't get a tenant to go into it.

Q. How much did you get from the tenants that you rented

133 that house to?

A. I think I got about $9, or $8, say, after the murder, and $15 before it.

Q. $8?

A. Yes.

Q. Do you remember the case of Gordon against McPherson and others, in equity, No. 5339, in which you were plaintiff?

A. I recollect part of it.

Q. Do you recollect the case? You were the plaintiff in the case.

A. Yes. I hav-n't thought much of these things since.

Q. You say in your bill in that case, and you swear to it, that the said Kendall has neglected said property, and has permitted the buildings on said real estate to be abused, the doors and windows carried away, and the plastering badly broken, so that the said houses by Kendall's bad management have become damaged and much less saleable than when placed in the possession of
134 said Kendall. You say again: That by his control and possession of the said real estate Kendall has not only placed it out of the power of the plaintiff to make his property pay a fair rental value, but has also suffered such property to become unsaleable and deteriorated in value.

A. Yes.

Q. Now, what was the extent of the damage that was done?

A. The houses were so dilapidated that up to the time when they were offerred for sale nobody would buy them.

Q. And yet you said in your examination by Mr. Brown that $100 would put all those houses in proper repair.

A. Not those.

Q. Those four houses is what you said.

A. No; I said the two houses that belonged to Mr. Cingria; I also said that between two and three hundred dollars would
135 put in repair the four houses in Mr. Kendall's charge.

Q. Between two and three hundred dollars?

A. Yes; I don't know but what $200 would have done it. The patching of roofs and the fixing of the plastering and all this kind of thing make a house very dilapidated when anybody goes into a house to rent, when $5 worth of whitewash would put a house in condition to make it rent.

Q. Now, with respect to this power of attorney; who prepared that power of attorney?

A. I prepared it.

Q. How many drafts of that power of attorney were made?

A. There never was but one; I made it, and made it in Judge Cuppy's office, down on Pennsylvania avenue. I took it to Mr. Kendall, and he refused to sign it.

Q. Why did he refuse to sign it?

136 A. Because, he said, it did not satisfy him, and he made the alternations in it. That power of attorney is in existence somewheres, with his alternations.

Q. What were the alternations that he made?

A. I have almost forgotten the alternations that he made.

Q. Did not that power of attorney prohibit him from selling the property under the deed of trust, and compel him to hold it until the indebtedness was paid by the rents?

A. No; not in any power of attorney. We did not ask him to do

that. We just asked him to keep the property in repair and collect the rents and pay the debt.

Q. You say, then, you did not ask not to sell the property under the deed of trust, but to hold it until the indebtedness was paid by the rent?

A. Yes.

137 Q. You say you did not ask him to do that?

A. I simply asked him to hold the property. There was no question about his selling it after he made this proposition. He had advertised. He had threatened a sale and advertised two or three times, and then finally made this proposition himself to me. Then I went and drew up this power of attorney and came to him and he objected to it and altered it in his own handwriting. That power of attorney is in existence in his own handwriting.

Q. Who has it?

A. I do not know. It must be among the papers somewhere in Mr. Kendall's own handwriting.

Q. Did not Mr. Kendall give you as one reason for his re-

138 fusing to accept that power of attorney that under it he could not sell the property under the deed of trust, but must hold it until the total indebtedness was paid by the receipts from the property?

A All questions of selling had ceased from the time that the power of attorney was to be given.

Q. Didn't you know that under this deed of trust all of the notes which Mr. Kendall held, being unpaid, that Mr. Kendall had a right to sell the property at any moment?

A. Certainly I did, and when he accepted of this proposition of which I just now told you, it was good for me. I readily complied with his wishes, but he has told me distinctly that he would collect the rents and pay the debt, and the power of attorney, I think, expressed that.

Q. (Submitting a paper to witness.) Is that a correct copy

139 of the power of attorney which Mr. Kendall accepted?

A. (After examining same.) That, sir, I think, is the real copy.

Q. Now, if it had been your intention, and if it was Mr. Kendall's agreement that he should not be allowed to sell the property under the deed of trust by this power of attorney, don't you think you would have inserted that provision especially?

A. No, because there was no question of selling afterwards when the power of attorney was suggested. All question of selling had ceased. We had no more to say about selling. The property was taken with a view to collecting the rents and settling the debt.

Q. Who prepared this power of attorney; the second one which you have just had submitted to you?

A. That was prepared, a portion of it, by Judge Cuppy. He inserted a word or two here and there.

140 Q. But who prepared it; you?

A. Yes, sir; I prepared it.

Q. And yet you knew that when this power of attorney was pre-

pared and signed Mr. Kendall had a right, if he chose to do so, to sell the property under the deed of trust.

A. Yes, sir, when I prepared the power of attorney; but after he accepted the power of attorney I was satisfied then that the whole thing was for my benefit.

Mr. Brown, the counsel for the complainant, offers in evidence that portion of the answer of the defendant, John E. Kendall, in the equity suit No. 5339, that is referred to in the original bill in the suit 5520, namely, the 3rd paragraph of said answer.

CHARLES V. GORDON.

141 Sworn to and subscribed before me—

H. H. ALEXANDER,
Examiner.

Adjourned.

142 *Replication of John D. McPherson, Compl't, by Cross-bill. Filed April 9, 1881.*

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE, Compl't
vs.
CHARLES V. GORDON, JOHN E. KENDALL, and JOHN D. McPHERSON. } No. 5520. Doc. 17.

JOHN D. McPHERSON
vs.
FRANCIS DAINESE, CHARLES V. GORDON, JOHN E. KENDALL, *et al.* } In Equity. No. 5520. Doc. 17.

The complainant, John D. McPherson, by cross-bill, hereby joins issue with the defendant to said bill.

ROB'T W. McPHERSON,
Sol'r for McPherson.

[Endorsed:] [In pencil:] (12.) 5520 Doc. 17. F. Dainese, *v.* John E. Kendall *et al.* Replication of John D. McPherson, compl't, by cross-bill.

[In pencil:] (22.)

143 *Decree Setting aside Sale and Ordering New Sale. Filed April 13, 1881.*

In the Supreme Court of the District of Columbia. Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL. } No. 5520.

This cause coming on to be heard upon the bill, answer, and testimony, and argument of counsel having been heard, it is, upon consideration, this 13th day of April, 1881, ordered, adjudged, and decreed that upon the payment of the costs of this proceeding by

the plaintiff herein within ten days from this date, the sale heretofore made by the trustee, John D. McPherson, be and same is hereby rescinded and set aside, and from this decree the said defendant gives notice of appeal, and the said appeal is allowed.

By the Court:

A. WYLIE.

[Endorsed:] [In pencil:] (22.) Eq. No. 5520. Sup. Court District of Columbia. Francis Dainese *vs.* John E. Kendall. Decree setting aside sale and ordering new sale.

144 *Docket Entries.*

1881. April 19. Costs, clerk's office, to date, paid by deposit $10, and bal., 60, by F. Dainese.

1881. April 21. Vacation of order of April 13, 1881. Motion for and notice of motion filed. Lost or mislaid.

1881. April 21. Payment of costs under decree of April 13, 1881. Receipt for filed. Lost or mislaid.

145 *Costs Paid by Defendant Dainese.*

MARCH 8, 1881.

F. Dainese to H. H. Alexander, Dr.

To services as examiner in chancery in F. Dainese *vs.* J. E. Kendall *et al.*, Eq. No. 5520 ---------- $20 00

Received payment.

H. H. ALEXANDER.

APRIL 5, 1881.

F. Dainese to H. H. Alexander.

To services as examiner in chancery, 32 folios @ 25c. ------ $8 00

Received payment.

H. H. ALEXANDER.

Approved: CHAPIN BROWN.

[In pencil:] (24.)

146 *Order Overruling Motion of Defendant Filed April* 21, 1881. *Filed April* 26, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
v.
JOHN E. KENDALL. } No. 5520.

This cause came on to be further heard on a motion of the counsel for the defendant, John E. Kendall, to set aside the order passed on the 13th day of April, 1881, and was argued by counsel, and thereupon, upon consideration thereof, the motion was denied.

By the Court:

A. WYLIE.

[Endorsed:] [In pencil:] (24.) In equity. No. 5520. Francis Dainese *v.* John E. Kendall *et al.* Order overruling motion of defendant filed Apr. 21, 1881.

147 *Receipt of Defendant Kendall taken on Docket.*

APRIL 27, 1881.

Received of Clark $7.80, amount by me paid to W. W. Wishart for taking depositions, and by order of court directed refunded to me.

(Signed) JOHN E. KENDALL.

148 *Undertaking in General Term by Def't Kendall. April* 29, 1881.

In the Supreme Court of the District of Columbia, the 29th day of April, 1881. In Equity.

FRANCIS DAINESE, Plaintiff,
[*vs.*]
JOHN E. KENDALL, Defendants. } No. 5520.

The defendant Kendall having appealed to the general term from the above decree pronounced herein on the 13th of April, 1881, in the equity court, and Peter F. Bacon, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

JOHN E. KENDALL, *Appellant.*
PETER F. BACON, *Surety.*

Approved.

A. WYLIE,
Justice, &c.

[In pencil:] 27.

[Endorsed:] [In pencil:] (26.) No. 5520. In equity. Dainese *vs.* Kendall & *al.* Undertaking for appeal by John E. Kendall to gen'l term.

149 *Decree of General Term Overruling and Reversing Decree of Special Term.*

In the Supreme Court of the District of Columbia, sitting in General Term, Cartter, Chief Justice, presiding, this 19th day of October, A. D. 1881. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL & *al.* } No. 5520.

This cause *come* on to be heard upon an appeal from the decree of the special term, passed therein on the 13th day of April, A. D. 1881, vacating and setting aside the sale made by the defendant, John D.

McPherson, trustee, on the 26th day of March, A. D. 1877, and was argued by counsel: it is now upon consideration thereof ordered, adjudged, and decreed that the said decree of the special term be, and the same hereby is, overruled and reversed, and that the said sale is ratified and confirmed; &, further, that this cause be remanded to the special term for further proceedings.

By order of the court.

CARTTER,
Chief Justice.

149½ [Endorsed:] [In pencil:] (27.) In equity. No. 5520. Dainese *vs.* Kendall & *al.* Decree of general term overruling & revers ing decree of special term. 4 M. G. T., p. 172.

[In pencil:] (28.)

150 *Motion and Notice thereof for Reference to Auditor Filed Oct.* 27, 1881.

In the Supreme Court of the District of Columbia. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL & *al.*
} No. 5520. Doc. 17.

The defendant Kendall, by his solicitor, R. Ross Perry, moves the court that this case be referred to the auditor to make distribution of the proceeds of the sale of lot 17 in square 140, made by the defendant McPherson as trustee, on the 26th day of March, A. D. 1877.

R. ROSS PERRY,
Def'ts' Solic'r.

Take notice that on Tuesday, the 1st day of November, 1881, at 10 o'clock a. m., or as soon thereafter as counsel may be heard, I will call up the above motion before the justice holding the special term for equity business.

R. ROSS PERRY,
Def'ts' Solic'r.

To Messrs. Cuppy & Brown, comp't's solic'r.

Service acknowledged this 27 day of Oct., A. D. 1881.

CHAPIN BROWN,
Comp'ts' Solic'r.

[Endorsed:] [In pencil:] (28.) In equity. No. 5520. Dainese *vs.* Kendall *& al.* Motion & notice thereof for reference to auditor.

[In pencil:] (29.)

151 *Order granting Appeal. Filed Oct.* 31, 1881.

In the Supreme Court of the District of Columbia. In General Term. In Equity.

FRANCIS DAINESE
v.
JOHN E. KENDALL *et al.* } No. 5520.

And now comes the plaintiff, by his solicitors, and prays an appeal from the decree entered in this cause the 19th day of October, A. D. 1881, and upon consideration thereof the same is allowed.

By the court:

CARTTER, *Chief Justice.*

[Endorsed:] [In pencil:] (29.) In equity. No. 5520. Dainese *vs.* Kendall *et al.* Order granting appeal.

152 *Appeal Bond.*

In the Supreme Court of the District of Columbia, the — day of ——, 18—. In Equity.

FRANCIS DAINESE
vs.
JOHN E. KENDALL, JOHN D. MCPHERSON, and CHARLES V. GORDON. } No. 5520.

Know all men by these presents that we, Francis Dainese and Frank-in Tenney, are bound unto the above-named John E. Kendall, John D. McPherson, and Charles V. Gordon in the sum of two hundred dollars, to be paid to the said John E. Kendall, John D. McPherson, and Charles V. Gordon, the executors or administrators.

To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 31st day of October, 1881.

Whereas the above-named Francis Dainese has prosecuted his appeal to the Supreme Court of the United States to reverse
153 the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Francis Dainese shall prosecute his said appeal to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANCIS DAINESE. [SEAL.]
FRANKLIN TENNEY. [SEAL.]

Approved by the court.

D. K. CARTTER,
Chief Justice.

Sealed & delivered in presence of—
Witness: THO. H. HARBIN.

[Endorsed:] [In pencil:] (30.) In equity. No. 5520. Dainese *vs.* Kendall *et al.* Appeal bond.

AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 3rd day of November, 1882.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, Jr.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 3rd day of November, 1882.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 3rd day of November, 1882.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, Jr.,
Assistant Clerk.

Endorsed on cover: Dist. of Col. Supreme Court. No. 161. Francis Dainese, appellant, *vs.* John E. Kendall, John D. McPherson, and Charles V. Gordon. Filed 4th November, 1882.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 4.

FRANCIS DAINESE, *Appellant*,

vs.

JOHN BLAKE KENDALL, *Executor, and* JOHN BLAKE KENDALL AND LILEAN KENDALL RUSSELL, *heirs and devisees of* JOHN E. KENDALL, *deceased*, JOHN D. McPHERSON AND CHARLES V. GORDON.

Brief for Appellant.

The present counsel for the appellant came into this case after the record had been made up and filed in this Court, having had no connection with the case in the Court below.

Statement of the Case.

The material facts in the case, as shown by the bill, cross-bill, and answers, and by the evidence, are as follows:

December 1, 1870, the appellant, Francis Dainese, being the owner of property known as lot No. 17, square No. 140, in the city of Washington, upon which he had erected four houses, sold the same to Charles V. Gordon (one of defendants) for $6,500.

Gordon paid $500 in cash, and gave three notes for $2,000 each, due in one, two, and three years, respectively, secured by deed of trust on said property, the defendant McPherson being named as trustee.

In August, 1870, Dainese sold the first of said notes to John E. Kendall for $2,000, the same being worth, with accrued interest, $2,090.

June 13, 1871, after maturity of said first note, and for some reason not appearing, Dainese sold the two remaining notes to Kendall, receiving back in consideration therefor the first note and $1,803.79 in cash.

The transaction thus stood substantially as follows: Appellant Dainese retained one of three notes secured by the trust deed, but without other security, and Kendall held the other two notes, with the additional security of Dainese's endorsement.

In June, 1873, the notes not having been paid, Gordon gave Kendall a power of attorney (page 34) to collect the rents, to pay certain expenses, and, after retaining 5 per cent. commission for himself, to pay the debt secured by the trust deed.

While Kendall was acting under said power of attorney and collecting rents at the rate of about $60 per month, (Q. 49, p. 36,) but without paying any portion of said collections to Dainese, he sued Dainese as endorser upon one of the two notes aforesaid, (pp. 8–9,) and obtained judgment against Dainese for principal and interest.

After obtaining said judgment Kendall demanded of McPherson, the trustee, to sell the property. McPherson thereupon advertised said property and offered it for sale March 26, 1877.

The day was very cloudy and the weather threatening at the hour fixed for the sale, (p. 25; Q. 4, p. 30; Q. 16, p. 31,) and the rain was either falling at the time of the sale or had been falling immediately before. There were very few persons at the sale and no bidders. (P. 25; Q. 26, p. 33.) Defendant Gordon was there and read aloud a written protest against the sale, (Q. 36, p. 34; also p. 25—original page 72,) stating that the matter would be carried into court if the sale was proceeded with. The protest was such as would naturally have deterred any one from bidding, (see trustee McPherson's testimony, Q. 7, p. 31,) and, as a "consequence of the reading of said protest," Kendall was the only bidder for said property. (See Kendall's answer, p. 7)

Kendall bid in said property for $2,000, paying $100 down. But the terms of sale have never been further complied with and no deed to the property was ever made by the trustee to Kendall.

The property was worth at the time of sale from $4,000 to $7,000. (Witness Duncanson says houses worth $1,000 apiece, pp. 18 and 21; Wescott says $1,600 or $1,800 apiece, p. 23–24; Gordon says $1,000 apiece, p. 25; Dainese says houses, including

lots, cost $1,500 apiece, p. 27; and Gordon says $200 or $300 would have put them in good repair, p. 43–44.) Defendants Kendall and McPherson, and the auctioneer, Waggaman, testified that the price realized was a fair one.

The only witnesses upon the subject of value who were not connected with the sale, or interested in the result, were Duncanson and Wescott.

Within a month after the said sale a reliable party made a written offer to purchase the property, if again offered for sale, on easy terms at $6,000, provided certain repairs were made. (P. 4.)

After the said sale Kendall made some extensive alterations in the property, which he swears cost two thousand dollars.

April 24, 1877, Dainese filed his bill setting out the facts, and praying that the sale be set aside and a receiver appointed to collect rents and make repairs; that the property, when in a proper condition, be resold under order of court at easy rates on long time and in parcels, and that the proceeds of the sale be distributed between Kendall and plaintiff according to the notes held by them; that Kendall pay the plaintiff one-third the net proceeds of the rents collected by him, and that a special auditor be appointed to state the account between them, and for general relief.

Upon the hearing before Judge Wylie the sale was vacated and set aside. Defendants appealed to the General Term, where the following decree was entered:

"It is now, upon consideration thereof, ordered, adjudged, and decreed that the said decree of the Special Term be, and the same hereby is, overruled and reversed, and that the said sale is ratified and confirmed; and, further, that this cause be remanded to the Special Term for further proceedings."

From the foregoing decree Dainese appealed to this court.

Specification of Error.

Appellant alleges that said decree was erroneous in this, that it overruled and reversed the decree of the Special Term and ratified and confirmed said sale.

The transaction thus stood substantially as follows: Appellant Dainese retained one of three notes secured by the trust deed, but without other security, and Kendall held the other two notes, with the additional security of Dainese's endorsement.

In June, 1873, the notes not having been paid, Gordon gave Kendall a power of attorney (page 34) to collect the rents, to pay certain expenses, and, after retaining 5 per cent. commission for himself, to pay the debt secured by the trust deed.

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From the foregoing decree Dainese appealed to this court.

Specification of Error.

Appellant alleges that said decree was erroneous in this, that it overruled and reversed the decree of the Special Term and ratified and confirmed said sale.

Brief.

I.

This case differs from an ordinary proceeding instituted to set aside a foreclosure sale. It is not a proceeding by a mortgagor seeking to redeem. It is a suit by a co-creditor seeking to protect his rights which, under the very special and peculiar circumstances of this case, are in a fair way of being totally submerged.

The decree of Judge Wylie setting aside the sale was apparently made in the exercise of a wise discretion, and should not have been disturbed.

It must not be overlooked that, while Dainese and Kendall were contemporary mortgagees, as it were, and although Kendall actually held two of the notes and Dainese only one, yet that Dainese was *practically* the creditor, having the greatest interest in the sale and the one who most suffers from a failure to realize the value of the property. While Kendall actually held two of the notes for which he paid Dainese $3,675.79, yet one-half of this sum, with the accrued interest, must be repaid to the Kendall estate on account of the judgment obtained against Dainese. Upon every equitable principle, therefore, Dainese is entitled to consideration by the court, and any proceeding, or series of proceedings, the net result of which will be a sacrifice of his rights, should be regarded with disfavor.

The sale in controversy was made, not at Dainese's instance, but at the request of Kendall alone, and the property was bid in by Kendall at one-third or one-half its fair value.

II.

It is of course well settled that mere inadequacy of consideration will not in itself—at least, at the instance of a mortgagor—warrant the setting aside of an otherwise fair and properly conducted sale. But, when the inadequacy of consideration is marked, the disposition of the courts is to take notice of it in connection with other circumstances, where, upon the whole, there is ground to believe that equity has not been done, and that the interests which the courts are charged to protect will be better served by ordering a resale under more favorable circumstances.

"The court cannot lose sight of the great disparity between the value of the mortgaged premises and the price at which it was sold, especially as the purchaser is the mortgagee himself." (Mott *vs.* Walkly, 3 Edw. Ch, (N. Y.,) 592.)

In Howell *vs.* Hester, 3 Green's Ch., (N. J.,) 260, property was sold under a mortgage for about one-fourth its value. Upon petition of party owning a subsequent incumbrance, and on a showing that the property would sell for considerably more, sale was set aside and new sale ordered.

In Rea's Executors *vs.* Wheeler, 27 N. J. Eq., 292, property sold under mortgage for much below its value. No deed having been made, sale was vacated at instance of complainant.

Adams *vs.* Haskell, 10 Wis., 123:

Sale of mortgaged premises by referee. Property bid in for less than one-third its value. Agent of petitioner offered to bid near its value if sale opened. Court below ordered resale on condition that amount offered be deposited as a bid and certain costs paid. Order affirmed, and the court referred to it as "a very sound exercise of discretion under the circumstances."

In Vaughn *vs.* Smith, 3 Tenn. Ch., 368, a sale by a master was opened a second time on an advance bid of 10 per cent.

See also Brush *vs.* Shuster, 3 Abb. N. C., 82; 24 N. J. Eq., 60; 3 Johns. (N. Y.) Ch., 424.

Montague *vs.* Dawes, 96 Mass., 373:

"One who undertakes to execute a power of sale is bound to the observance of good faith and a suitable regard for the interests of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power."

Mortgagor permitted to redeem, notwithstanding sale, upon the ground that notice was so defective that it "proved ineffectual to attract purchasers."

Roche *vs.* Farnsworth, 106 Mass., 513:

"In this case the advertisement brought no bidders to the auction, and none were there, except Farnsworth's attorney and the defendant Riley, who was brought there by the auctioneer. It could hardly be called a sale at public auction."

Final decree allowing redemption on certain terms fixed by court.

In Drinan *vs.* Nichols, 115, Mass., 357, "although the mortgagee acted in good faith, and did all she supposed she was legally required to do in conforming to the terms imposed by the power," yet, not being fully regardful of the interests of the mortgagor in the matter of giving personal notice to the plaintiff, the court said :

"The sale is therefore liable to be set aside in equity, no deed having been delivered, and the plaintiff is entitled to redeem upon terms equitable to all parties."

III.

It is not assumed that all of the above cited cases are closely parallel with the one now before the Court, each case resting largely upon its special facts. Yet the general principles are conceived to have an equal application to the present case. In several of the cases referred to the mortgagor is the party seeking relief, and any doctrine sanctioning relief in such cases would seem to apply *a fortiori* to the case at bar, where the party aggrieved is a co-creditor, having equal equities with the creditor who forced the sale and bid in the property.

Did this creditor who forced the sale, and the trustee acting under his directions, proceed with a due regard for the interests of all parties? Were they fully mindful of and studiously careful to guard the interests of all parties, or in fact of any party except Kendall himself?

In Markey *et al. vs.* Langley *et al.*, 92 U. S., 142, this Court, in speaking of a sale by a first morgagee, said that he "is a trustee for the benefit of all concerned;" that he must regard the interests of others as well as his own, and "should seek to promote the common welfare."

Is there any pretence that Kendall did this in the present instance? Under his instructions the property was put up for sale on a day when the weather was bad—"very cloudy and threatening"—to adopt the language of the trustee himself, (Q. 16, p. 31,) when there were no bidders on hand at all, and after Gordon had read aloud a written protest warning all parties that the sale, if then made, would be contested; which protest the trustee

himself admits would have deterred any one from bidding, and which defendant Kendall substantially admitted in his answer (p. 7) did actually prevent any bids being made except his own.

Under these circumstances, to employ the language of the Court in 106 Mass., 515, above cited, "it could hardly be called a sale at public auction."

It was the manifest duty of the trustee, seeing the impossibility of a fair and advantageous sale at that particular date, to have adjourned it to a more favorable opportunity. To sell under the circumstances at that hour and on that day was little short of a willful sacrifice of the rights of every one concerned, except Kendall.

In such a case it was not sufficient that there was a "literal and technical" compliance with the terms of sale; it should have been a "fair and reasonable" compliance in order to secure "an advantageous sale of the property for the benefit of all parties interested." (Horsey *vs.* Hough, 38 Md., 139, quoted by this court in 92 U. S., 154.)

In Roche *vs.* Farnsworth, (106 Mass., 513,) above cited, the sale was avoided because the advertisement "brought no bidders." In the present case there were no bidders, either because of the very threatening weather, or because, as the defendant Kendall admitted in his answer, "in consequence of" the protest of Gordon. But the point in the matter is that *in consequence* of these merely transitory circumstances, one or both, and both of which *might* have been avoided by a postponement, *there were no bidders.*

Yet, in the face of this all-important fact, the sale was persisted in, and the whole property thrown into Kendall's hands at very much less than its actual value.

IV.

Dainese's interest appears to have been given little consideration; yet, in what respect was he in fault? There is not a shadow of proof that he was responsible for the protest or that he was present at the sale or even in the city at that time. If, therefore, the protest operated to prevent anything like a fair sale, he has a right to complain that the sale was persisted in at a time when its only effect must have been an absolute sacrifice of his rights.

On the other hand, the court can readily estimate the very considerable profit arising to Kendall out of the whole transaction, taking into consideration the rents collected, the amount recovered in the judgment against Dainese, and the possession of the property, itself worth twice or thrice the amount bid for it.

If the decree of the General Term be reversed, and the original decree of Judge Wylie be allowed to stand and a new sale be ordered and a proper accounting had, it cannot be shown that Kendall's estate will be harmed in any way, while Dainese's interests will be protected; whereas, if the decree confirming the sale be affirmed, Kendall's estate will be most unjustly enriched at the expense of Dainese, who will be effectually stripped of a large part of his just dues, all of which could be provided for from the proceeds of a new sale.

It is to be observed that the repairs or alterations alleged to have been made by Kendall subsequent to his bidding in the property have little if any bearing on the original merits of the case, having been made by Kendall after the bill to set aside the sale was filed.

We respectfully submit that the decree of the Court in General Term, herein appealed from, should be overruled.

J. W. & GEO. L. DOUGLASS,
Attorneys for Appellant.

SEPTEMBER 20, 1886.

119-50

OCT 11 1886
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1886.]

FRANCIS DAINESE, *Appellant*,

vs.

JOHN BLAKE KENDALL, *Executor*, LILEAN K. RUSSELL, *et al*, *Appellees*.

No. 4.

Brief on Behalf of Appellees.

Since this cause was docketed, John E. Kendall, appellee, has departed this life, and his representatives, both personal and real, have been substituted and appear in his stead, and for whom we submit this brief as to the merits of the controversy.

A motion was made by Mr. Perry, counsel for John E. Kendall, to dismiss the appeal, on the ground that the decree appealed from was not final; and briefs are filed by both parties on this question, but the consideration of the motion was postponed until the hearing on the merits.

On an examination of the printed record, it seems to us that it hardly states the case fully enough to enable this Court to pass fairly on the merits of the controversy, because the record in suit at-law, No. 13,391, (R., p. 9, 14), of *Kendall* vs. *Dainese;* and in Equity suit 5339, (R., p. 2, 7, 14), *Gordon* vs. *Kendall, et al;* and the deed of trust un-

der which the sale was made, (referred to on p. 12,) being in Liber 602, folio 324, are neither of them copied into this record, although made part of the case by references thereto.

If it should appear to the Court, that the record is too defective to present the nature of the issue, and the probable equities of the case, we suggest that an opportunity be given to have the deficiencies supplied. We hope, however, there is apparent from the record as now certified, facts undisputed sufficient to govern the decision on the merits.

The bill was filed April 24, 1877, for the purpose of setting aside a sale made March 26, 1877, by the defendant, John D. McPherson, as trustee under a deed of trust, given Dec. 1, 1869, to secure $6,000, on lot 17 square 140, improved by 4 small frame houses.

The bill is filed by Francis Dainese, the payee of the notes secured by the trust and the alleged holder of one of the three notes representing the $6,000—each note being for $2,000, and due in one, two and three years.

The bill also seeks to have a re-sale, through the Court, and an account with defendant, Kendall, as to certain rents said to have been collected by him, and to have $\frac{1}{3}$ applied on the note held by complainant, (the other two being held by said defendant), and to have the proceeds of such re-sale apportioned in like manner.

The defendant, Charles V. Gordon, is the maker of the notes, and was the owner of the equity of redemption.

The ground on which a new sale is asked, is that of inadequacy in the price. The question of accounting for rents, and apportioning the proceeds of sale, can be adjusted on reference to the auditor in the present suit, so that practically, the only question to be considered by this court on the merits, is the one in regard to re-sale.

Shall the sale made by the trustee to defendant, Kendall, for $2,000, stand as a valid sale?

The sale was made in parcels, (p. 33,) on fair terms, ¼ cash, balance in three instalments, at 6, 12 and 18 months. (R., p. 2.) The property had been advertised for sale, previous to June 1, 1873, more than once, (R., p. 34, 36, 45,) and again in 1876, (p. 2,) and no sale made for want of bidders, and because of the bill for injunction filed by Gordon. This bill was unavailing, and notwithstanding the protest of Gordon, at the subsequent offer, the property was finally sold.

Then began the present litigation, wherein Dainese seeks to set aside the sale, on claiming an interest in the proceeds, the right to which interest, as against Kendall, had been expressly denied to him in the previous litigation at law, in No. 13,391. (R., p. 8, 9, 14.)

Dainese had endorsed the two notes to Kendall, and as such endorser, was held liable, personally, for payment of the last note, in the said suit at law, and judgment was so entered therein.

The trustee, John D. McPherson, a well known member of the bar of this Court, and of high standing as a citizen of this District, says that the sale was for as much as the property would bring at auction (p. 31).

Thos. E. Waggaman, who has probably had as much experience in real estate business, as any man in Washington City, and who knew the value of property in the neighborhood of this, says it was a fair sale, for a fair price (p.33).

H. S. Litchfield, the builder, says, that $500 apiece for these houses, when sold to Mr. Kendall, was all they were worth (p. 38). He put on $2,150 worth of repairs for Mr. Kendall, directly after the purchase, the contract for which had been made before the bill was filed (p. 7, 38).

The very manner and place of construction of these houses, and the second-hand material, old lumber from barracks out

of which they were built, shows that the property was of very little value. They were built on piles driven in the ground; (p. 26). and afterwards, the street was graded above the grade of the lots, about 12 feet, (p. 35). leaving the houses in a hole. The shingle roofs could not be repaired, under building regulations, (p. 38) so that new tin roofs were required, at great expense, to render the property fit for habitation. Its tenants had been of a low grade of colored people, and Stone had murdered his wife in one of these houses, thereby making it a place of dread to superstitious tenants, and imparing its rental value (p. 43).

It seems to us, that the complainant is not in a position to maintain this bill, for various reasons; that the same questions were, in the main, decided in favor of defendant, in the previous litigation referred to in the pleadings; that on the merits, the controversy must be determined, so far as the sale is concerned, in favor of defendants; and that if there are open questions concerning the account between Dainese and Kendall's estate, they can be settled on the reference to auditor asked for. (p. 49.)

The offer made by Compton, (p. 4,) is only a pretence. Compton was a tenant of one of these houses, (p. 43,) and there was nothing in the offer to give it the semblance of good faith; and nothing to give any security that the payments would be made, on the long time indicated. The sale by Dainese to Gordon, Dec. 1, 1869, looks to be for a fictitious consideration. At any rate, there was no good faith shown by Gordon in paying the notes given for the deferred payments. It was very evidently a strained valuation, if not a fictitious one, that was named in the transaction.

A sale will not be set aside for inadequacy of price, unless the price be so grossly inadequate as to shock the

moral sense of the Court, and to create at once, upon its being mentioned, a suspicion of fraud.

Clark vs. *Krause*, 2 Mack. 559.
Clark vs. *Trust, Co.*, 100 U. S. 149.
Lessee of Cooper vs. *Galbraith*, 3 Wash. C. C. 546.

The complainant can make no claim to have the sale in this case set aside, on any other ground than that of price, for he claims no other interest in the property, than to have a share of the proceeds of the sale; and his contention is, that it should sell for enough to pay his note.

We submit if your honors should conclude, that the decree appealed from was of such nature as to give you jurisdiction of the cause, that said decree should be affirmed.

JAMES S. EDWARDS,
JOB BARNARD,
Solicitors for Appellees.